IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appeal No. (not yet assigned)	:
	:
In re Application of	:
	: Group Art Unit: 3629
NEREIDA MARIA MENENDEZ et al.	:
	: Examiner: Naresh Vig
Serial No. 09/698,491	:
	: Attorney Docket No. 285277-00015
Filed: October 27, 2000	:
	: Confirmation No. 6433
SYSTEM AND METHOD FOR COMPLETING A RENTAL AGREEMENT ONLINE	:

APPELLANTS' BRIEF ON APPEAL

March 19, 2007

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is an Appeal from the decision of the Examiner, dated September 19, 2006, rejecting Claims 1-73 of the above-captioned application. The claims are set forth in Appendix 1, which is attached hereto.

An Oral Hearing is not deemed necessary or desirable and is not requested.

Real Party In Interest

The real party in interest is Vanguard Trademark Holdings USA LLC, a limited liability company organized and existing under the laws of Delaware, having a place of business at 6929 North Lakewood Avenue, Suite 100, Tulsa, Oklahoma 74117-1808.

Related Appeals and Interferences

There are two prior and pending appeals, interferences or judicial proceedings known to Appellants, the Appellants' legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. These include the prior and pending appeals of Application Serial Nos. 09/698,502 and

09/698,552, which applications are identified as being related applications on page 1, lines 5 and 9-12 of the above-captioned Application Serial No. 09/698,491.

Status of Claims

Claims 1-73 stand rejected.

Claims 22-24 are canceled.

Claims 1-21 and 25-73 are being appealed.

Status of Amendments

There are currently no amendments to pending Claims 1-21 and 25-73. An amendment to cancel Claim 24 was filed on March 16, 2007. The claims as they stand on appeal are contained in the Appendix 1 to this Appeal Brief.

Summary of Claimed Subject Matter

Claim 1

The invention provides a method for completing a rental agreement 4 online, the method comprising the steps of: entering reservation-related information 8 and rental-related information 10 for an item 11 or service 168, the entering step entering: (a) the rental-related information 10a without employing a master rental agreement 12, or (b) at least some of the rental-related information 10b from a master rental agreement 12 and allowing modification 13 of the information 10b from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12; providing a reservation 16 for the item 11 or service 168 based at least in part upon the reservation-related information 8; creating 14;124 and displaying 28;142 a rental proposal 18;140;268 based upon the reservation 16 and the rental-related information 10; accepting 20;146;480 the rental proposal 18;140;268 online; and displaying 74;82;484 a rental agreement 4 based upon the accepted rental proposal 18;140;268. *See* Figures 1 and 2, page 8, line 31 through page 9, line 8; and page 10, line 4 through page 13, line 27 of the specification. *See also* Figure 3, page 13, line 28 through page 15, line 24; Figure 4, page 15, line 25 through page 17, line 10; Figure 6D; and Figures 6K and 6L, page 26, line 4 through page 27, line 4 of the specification.

Claim 4

The method may further comprise entering at least some of the rental-related information 10b from a master rental agreement 12, and allowing modification 13 of the information 10b from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12. *See* Figure 1, and page 10, lines 5-13 of the specification. *See also* Figure 6B, page 20, line 27 through page 21, line 10, and page 31, line 33 through page 32, line 6 of the specification.

Claim 6

The method may also comprise maintaining 560;66 a history of rental information 382;384 for prior rentals by a user, entering information 338 from an identification of a user, and entering 562 at least some of the rental-related information 382;384 from the history based upon the information from an identification of a user without employing a master rental agreement 12. *See* Figures 6F, 6H and 7B, page 23, line 32 through page 24, line 21, and page 28, lines 17-26 of the specification.

Claim 17

The method may further comprise selecting a capacity 252 of the vehicle in the reservation-related information 8. *See* Figure 6C, and page 19, lines 8-23 of the specification.

Claim 32

The method may further comprise displaying rental terms and conditions 104;479 in the rental proposal 18;140;268. *See* Figures 3 and 6K, and page 15, lines 2-3, and page 26, lines 4-15 of the specification.

Claim 35

The method may also comprise linking 114 from the e-mail message 96 to a web page 198 to complete the rental agreement 4. *See* Figures 3 and 6F, and page 15, lines 18-22, page 21, line 26 through page 26, line 15 of the specification.

Claim 36

The method may further comprise modifying 118;514 the rental agreement 4. *See* Figure 3, and page 15, lines 23-24 of the specification. *See also* Figure 6L, page 27, lines 2-4 of the specification.

Claim 38

The invention also provides a method for completing a rental agreement 4 between a client system 6;26;122 and a server system 14;34;124, the method comprising the steps of: under control of the client system 6;26;122, entering first information 8 pertaining to a reservation of an item 11 or service 168, and second information 10 pertaining to a rental of the item 11 or service 168, the entering step entering: (a) the second information 10a without employing a master rental agreement 12, or (b) at least some of the second information 10b from a master rental agreement 12 and allowing modification 13 of the second information 10b from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12, sending the first information 8 and the second information 10 to the server system 14;34;124, receiving from the server system 14;34;124 a rental proposal 18;140;268 based upon the first information 8 and the second information 10, displaying 74;82;142 the rental proposal 18;140;268, and accepting 20;146;480 the rental proposal 18;140;268 online to complete the rental agreement 4; and under control of the server system 14;34;124, receiving the first information 8 and the second information 10 from the client system 6;26;122, providing a reservation 16 based at least in part upon the first information 8, generating the rental proposal 18;140;268 based upon the reservation 16 and the second information 10, and sending the rental proposal 18;140;268 to the client system 6;26;122. *See* Figures 1 and 2, page 8, line 31 through page 9, line 8; and page 10, line 4 through page 13, line 27 of the specification. *See also* Figure 3, page 13, line 28 through page 15, line 24; Figure 4, page 15, line 25 through page 17, line 10; Figure 6D; and Figures 6K and 6L, page 26, line 4 through page 27, line 4 of the specification.

Claim 39

The method may further comprise including terms and conditions 104;479 in the rental proposal 18;140;268; displaying an object 480; selecting the displayed object 480 to accept the terms and conditions 104;479; and including the terms and conditions 104;479 in the rental agreement 4. *See* Figures 3 and 6K, and page 15, lines 2-3, and page 26, lines 4-15 of the specification.

Claim 40

The method may further comprise generating 160 the rental agreement 4;126 at the server system 14;34;124 based upon the accepted rental proposal 18;140;268. *See* Figures 1, 4, and 6D, and page 10, lines 14-21, page 16, line 5 through page 17, line 4 and page 21, line 5 through page 26, line 15 of the specification.

Claim 43

The invention also provides a client system 6;26;122 for completing a rental agreement 4 with a server system 14;34;124, the client system 6;26;122 comprising: an entry component 128 entering first information 8 pertaining to a reservation of an item 11 or service 168, and entering second information 10 pertaining to a rental of the item 11 or service 268, the entering step entering: (a) the second information 10 without employing a master rental agreement 12, or (b) at least some of the second information 10 from a master rental agreement 12 and allowing modification 13 of the second information 10 from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12; a processor component 133 cooperating with the entry component 128; a communication component 134, responsive to the processor component 133, sending the first and second information 8,10 to the server system 6;26;122, and receiving from the server system 6;26;122 a rental proposal 18;140;268 responsive to the sent first and second information 8,10; and a display component 142 displaying the rental proposal 18;140;268, the entry component 128 and the processor component 133 cooperating to initiate acceptance 20;146;480 of the rental proposal 18;140;268, and the communication component 134, responsive to the acceptance, sending the acceptance to the server system 6;26;122, in order to complete the rental agreement 4 online. *See* Figures 1 and 2, page 8, line 31 through page 9, line 8; and page 10, line 4 through page 13, line 27 of the specification. *See also* Figure 3, page 13, line 28 through page 15, line 24; Figure 4, page 15, line 25 through page 17, line 10; Figure 6D; and Figures 6K and 6L, page 26, line 4 through page 27, line 4 of the specification.

Claim 49

The invention also provides a server system 14;34;124 for completing a rental agreement 4 with a client system 6;26;122, the server system 14;34;124 comprising: a data storage component 148 storing information for a plurality of items 11 or services 168; a

communication and processing component 152;154 receiving first information 8 pertaining to a reservation of an item 11 or service 168 from the client system 6;26;122, and receiving second information 10 pertaining to a rental of the item 11 or service 168 from the client system 6;26;122; a reservation component 156 retrieving stored information from the data storage component 148 for the items 11 or services 168, and providing a reservation 158 based at least in part upon the first information 8 and the retrieved stored information; and a rental component 160 generating a rental proposal 8;140;268 based upon the reservation 158 and the received second information 10, sending the rental proposal 18;140;268 to the client system 6;26;122, and receiving an acceptance 20;146;480 of the rental proposal 18;140;268 from the client system 6;26;122, in order to complete the rental agreement 4 online, the rental component 160 receiving: (a) the second information 10 without employing a master rental agreement 12, or (b) at least some of the second information 10 from a master rental agreement 12 and allowing modification 13 of the second information 10 from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12. *See* Figures 1 and 2, page 8, line 31 through page 9, line 8; and page 10, line 4 through page 13, line 27 of the specification. *See also* Figure 3, page 13, line 28 through page 15, line 24; Figure 4, page 15, line 25 through page 17, line 10; Figure 6D; and Figures 6K and 6L, page 26, line 4 through page 27, line 4 of the specification.

Claim 53

The invention also provides a method for completing a rental agreement 4 with a server system 14;34;124 using a client system 6;26;122, the method comprising the steps of: entering first information 8 pertaining to a reservation of an item 11 or service 168, and second information 10 pertaining to a rental of the item 11 or service 168, the entering step entering: (a) the second information 10 without employing a master rental agreement 12, or (b) at least some of the second information from a master rental agreement 12 and allowing modification 13 of the second information 10 from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12; sending the first and second information 8,10 to the server system 14;34;124; receiving from the server system 14;34;124 a rental proposal 18;140;268 responsive to the sent first and second information 8,10; displaying 74;82;142 the rental proposal 18;140;268; accepting 20;146;480 the rental proposal 18;140;268; and sending the acceptance to the server system 14;34;124, in order to complete the rental agreement 4 online. *See* Figures 1 and 2, page 8, line 31 through page 9, line 8; and page 10, line 4 through page 13, line 27 of the

specification. *See also* Figure 3, page 13, line 28 through page 15, line 24; Figure 4, page 15, line 25 through page 17, line 10; Figure 6D; and Figures 6K and 6L, page 26, line 4 through page 27, line 4 of the specification.

Claim 54

The invention also provides a method for completing a rental agreement 4 with a client system 6;26;122 using a server system 14;34;124, the method comprising the steps of: storing 148 information for a plurality of items 11 or services 168; receiving from the client system 6;26;122 first information 8 pertaining to a reservation of an item 11 or service 168, and second information 10 pertaining to a rental of the item 11 or service 168; retrieving the stored information for the items 11 or services 168; providing a reservation 158 based at least in part upon the first information 8 and the retrieved stored information; generating a rental proposal 18;140;268 based upon the reservation 158 and the received second information 10, the generating step generating the rental proposal 18;140;268: (a) without employing a master rental agreement 12, or (b) employing at least some of the second information 10 from a master rental agreement 12 and allowing modification 13 of the second information 10 from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12; sending the rental proposal 18;140;268 to the client system 6;26;122; and receiving an acceptance 20;146;480 of the rental proposal 18;140;268 from the client system 6;26;122, in order to complete the rental agreement 4 online. *See* Figures 1 and 2, page 8, line 31 through page 9, line 8; and page 10, line 4 through page 13, line 27 of the specification. *See also* Figure 3, page 13, line 28 through page 15, line 24; Figure 4, page 15, line 25 through page 17, line 10; Figure 6D; and Figures 6K and 6L, page 26, line 4 through page 27, line 4 of the specification.

Claim 55

The invention also provides a system 2 for completing a rental agreement 4, the system comprising: a client sub-system 6;26;122 comprising: an entry component 128 entering first information 8 pertaining to a reservation of an item 11 or service 168, and entering second information 10 pertaining to a rental of the item 11 or service 168, the entry component 128 entering: (a) the second information 10 without employing a master rental agreement 12, or (b) at least some of the second information 10 from a master rental agreement 12 and allowing modification 13 of the second information 10 from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master

rental agreement 12, a processor component 133 cooperating with the entry component 128, a communication component 134, responsive to the processor component 133, sending the first and second information 8,10 to a server sub-system 14;34;124, and receiving from the server sub-system 14;34;124 a rental proposal 18;140;268 responsive to the sent first and second information 8,10, and a display component 142 displaying the rental proposal 18;140;268 the entry component 128 and the processor component 133 cooperating to initiate acceptance 20;146;480 of the rental proposal 18;140;268, and the communication component 134, responsive to the acceptance 20;146;480, sending the acceptance 20;146;480 to the server sub-system 14;34;124; the server sub-system 14;34;124 comprising: a data storage component 148 storing information for a plurality of items 11 or services 168, a communication component 152 receiving the first and second information 8,10 from the client sub-system 6;26;122, a reservation component 156 retrieving stored information from the data storage component 148 for the items 11 or services 168, and providing a reservation 158 based at least in part upon the first information 8 and the retrieved stored information, a rental component 160 generating a rental proposal 18;140;268 based upon the reservation 158 and the received second information 10, and a processor component 154 cooperating with the communication component 152, the reservation component 156 and the rental component 160 to provide the reservation 158, to send the rental proposal 18;140;268 to the client sub-system 6;26;122 and to receive an acceptance 20;146;480 of the rental proposal 18;140;268 from the client sub-system 6;26;122, in order to complete the rental agreement 4 online; and a communication sub-system 164 communicating between the communication component 134 of the client sub-system 6;26;122 and the communication component 152 of the server sub-system 14;34;124. *See* Figures 1 and 2, page 8, line 31 through page 9, line 8; and page 10, line 4 through page 13, line 27 of the specification. *See also* Figure 3, page 13, line 28 through page 15, line 24; Figure 4, page 15, line 25 through page 17, line 10; Figure 6D; and Figures 6K and 6L, page 26, line 4 through page 27, line 4 of the specification.

Claim 66

The invention also provides a method for completing a rental agreement 4 online and obtaining an item 11 or service 168 for rental, the method comprising the steps of: entering reservation-related information 8 and rental-related information 10 for the item 11 or service 168, the entering step entering: (a) the rental-related information 10 without employing a master rental agreement 12, or (b) at least some of the rental-related information 10 from a master rental agreement 12 and allowing modification 13 of the information from

the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12; providing a reservation 158 for the item 11 or service 168 based at least in part upon the reservation-related information 10; creating and displaying a rental proposal 18;140;268 based upon the reservation 158 and the rental-related information 10; accepting 20;146;480 the rental proposal 18;140;268 online; displaying the rental agreement 4 based upon the accepted rental proposal; and going to a rental counter 168 before obtaining the item 11 or service 168 for rental. *See* Figures 1 and 2, page 8, line 31 through page 9, line 8; and page 10, line 4 through page 13, line 27 of the specification. *See also* Figure 3, page 13, line 28 through page 15, line 24; Figure 4, page 15, line 25 through page 17, line 10; Figure 6D; and Figures 6K and 6L, page 26, line 4 through page 27, line 4 of the specification.

Claim 67

The method may also comprise displaying 142 the rental proposal 18;140;268 at a client system 6;26;122; and accepting 20;146;480 the rental proposal 18;140;268 at the client system 6;26;122 to complete the rental agreement 4. *See* Figures 1, 4 and 6D, and page 10, lines 17-21, page 15, line 25 through page 17, line 4, page 19, line 24 through page 26, line 15, and page 32, lines 7-12 of the specification.

Grounds of Rejection to be Reviewed on Appeal

Claims 1-5, 11-32, 36-60 and 62-64 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over "Information on Hertz Corporation, 1997 - 2000" (Hertz) in view of "Information on Avis Rent A Car, 03 March 2000" (Avis).

Claims 6-9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hertz in view of Avis and further in view of U.S. Patent No. 6,519,576 (Freeman).

Claims 10 and 61 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hertz in view of Avis and further in view of "Dollar Rent A Car Introduces DOLLAR® TRAVEL CENTER At Key Airport Locations, Customers Obtain Free Travel Information at Interactive Kiosks, 14 May 2000, www.kioskcom.com" (kioskcom.com).

Claims 33-35[1] stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hertz in view of Avis and further in view of "TravelWeb Takes Flight" (TravelWeb).

[1] Although not expressly stated by the Examiner, it appears that the Examiner rejects Claim 35 in view of Hertz, Avis, TravelWeb and Markbaul. *See,* Final Office Action, page 33, last paragraph.

Claim 65 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Hertz in view of Avis and further in view of "Install Firewall Hardware and Software hereinafter known as CERT" (CERT).

Claims 66-73 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hertz in view of Avis and further in view of "Taking Up Express" (Robinson).

Argument

The Examiner has incorrectly deduced obviousness from the cited references, since a combination of the teachings of those references does not suggest (expressly or by implication) the possibility of achieving further improvement by combining such teachings along the line of the invention, as claimed, and/or the invention, as claimed, has achieved more than a combination which those references suggested, expressly or by reasonable implication.

In considering whether obviousness has been correctly deduced from the prior art, relevant questions include:

> (a) whether a combination of the teachings of all or any of the references would have suggested (expressly or by implication) the possibility of achieving further improvement by combining such teachings along the line of the invention in suit, and (b) whether the claimed invention achieved more than a combination which any or all of the prior art references suggested, expressly or by reasonable implication.

In re Sernaker, 702 F.2d 989, 994, 217 U.S.P.Q. 1, 5 (Fed. Cir. 1983). A rejection must pass both of these tests to be proper. *Id.*

The Cited References

Hertz (page 17) discloses that one can check the latest Hertz rates and instantly make, modify (page 22), or cancel (page 22) reservations online. See, also, Hertz (pages 62-69), which deals with the Hertz reservation process. A credit card number is required to secure all reservations. If you're a Hertz #1 Club® or a Hertz #1 Club Gold® member you can use some or all of the information (including the credit card number) contained in your profile. Hertz (page 18) discloses a rate and general information screen. Hertz (page 27) discloses updating a Hertz #1 Gold Profile online.

Avis discloses a rates and reservations section of a web site by which a user can request a rate or make a reservation by clicking (Avis, page 7) on "Reserve This Car!"

Avis, pages 8-10, show making a reservation. Avis, page 10, shows "Make A Reservation: Confirmation" including information calculated based on information provided. "An Avis-honored charge card or an Avis Cash Pre-payment ID Card is required at the beginning of the rental."

Freeman discloses (col. 5, ll. 20-29) a system for predicting a transaction a customer may wish to make. In, for example, an Internet banking system, when the customer clicks to bring up an "inter-account transfer" panel, the system may recognize that usually, with a given balance in their savings and checking accounts, and at this time of the month, at this point in the financial year, the customer will want to transfer a given amount to their checking account. For credit card payments, the sub-system is trying to anticipate the credit card repayment amount which a customer will make, so the system can pre-fill the repayment amount for the customer. The bank has historical data for each customer relating to earlier credit card payments. For each payment, the bank knows the month (1-12), the checking account balance, the credit card balance at date of repayment, and the amount of payment made by the customer. Based on the domain expert's understanding of credit card repayments, the expert adds a fifth attribute which may be useful in determining likely repayment: the ratio of the credit card payment to the credit card balance. The minimum payment required by the bank on an outstanding balance is 10% of the balance, a ratio of 0.1; the likely maximum ratio for a customer is 1.0 (ignoring over-payment of a balance). The domain expert also decides to give both target attributes (absolute amount and ratio) an equal initial weighting.

The reference kioskcom.com discloses that a "DOLLAR® TRAVEL CENTER" is an interactive kiosk providing helpful travel information for its customers at various airports. The kiosks are conveniently located at the DOLLAR pickup and return areas at each airport. By touch, customers can make air, hotel and DOLLAR car rental reservations; obtain U.S. weather forecasts, driving directions and event information; access personal Web-based e-mail accounts, as well as receive free Internet access and view the top headline news of the day, all at the interactive kiosk.

TravelWeb discloses that users can make airline reservations online, process the reservation and provide a confirmation while the user is still online. TravelWeb then follows up within minutes with an email.

Markbaul may have disclosed pictures of trains.

CERT discloses a firewall system including the installation and configuration of an operating system that will execute firewall software followed by installation and configuration of firewall software.

Robinson discloses that some locations have an ATM machine at a staffed rental counter. At the counter, the customer inserts an Express Plus card or a credit card and it prints out a contract on the rental agent's side. The agent hands over the contract and checks for a driver's license. In Florida, state laws require that a rental contract be signed at the counter, so unattended ATM-type machines are not be available.

Claims 1-21 and 25-73, rejected under 35 U.S.C. § 103(a)

Claim 1

The Examiner errs in construing the term "rental agreement" when relying upon the Black's Law Dictionary's definition (p. 62) of the term "agreement" as being "[a]lthough often used as synonymous with 'contract', agreement is a broader term; *e.g.* an agreement might lack an essential element of a contract." *See* Appendix 2 (Evidence Appendix) (made of record by the Examiner with the Final Office Action mailed on September 19, 2006).

Claim terms are presumed to have the ordinary and customary meanings attributed to them by those of ordinary skill in the art. *Sunrace Roots Enter. Co. v. SRAM Corp.*, 336 F.3d 1298, 1302, 67 U.S.P.Q.2d 1438, 1441 (Fed. Cir. 2003).

During patent examination, the pending claims must be given their broadest "reasonable" interpretation consistent with the specification. *In re Hyatt*, 211 F.3d 1367, 1372, 54 U.S.P.Q.2d 1664, 1667 (Fed. Cir. 2000).

The broadest reasonable interpretation of the claims must also be consistent with the interpretation that those of ordinary skill in the art would reach. *In re Cortright*, 165 F.3d 1353, 1359, 49 U.S.P.Q.2d 1464, 1468 (Fed. Cir. 1999).[2]

The ordinary and accustomed meaning of the term "rental agreement" means the same as "rental contract," which is legally binding on the parties entering into it. *See* Webster's Third New International Dictionary, p. 43 (1993) (Appendix 2) (Evidence

[2] In Cortright, the Board's construction of the claim limitation "restore hair growth" as requiring the hair to be returned to its original state was held to be an incorrect interpretation of the limitation. The court held that, consistent with applicant's disclosure and the disclosure of three patents from analogous arts using the same phrase to require only some increase in hair growth, one of ordinary skill would construe "restore hair growth" to mean that the claimed method increases the amount of hair grown on the scalp, but does not necessarily produce a full head of hair. Cortright, 165 F.3d at 1359, 49 U.S.P.Q.2d at 1468.

Appendix) (entered in the record by the Examiner with the non-final Amendment filed on March 5, 2004). *See, also*, the present specification at page 15, line 13 ("accepted rental contract"); at page 26, lines 32 and 33 (in connection with Figure 6L, reciting ***(emphasis added)*** that "[t]he web page 484 further includes a 'Print' button 510 to permit the customer to print the final ***rental agreement***"); and Figure 6L (***emphasis added***) (the same button 510 states "print ***contract***").

The use of "rental agreement" in the claims and Appellants' definition thereof (*i.e.*, rental contract which is legally binding on the parties entering into it) is entirely consistent with the interpretation that those of ordinary skill in the art would reach. See, for example, "Information on Hertz Corporation, 1997 - 2000" (Hertz) (pp. 5, 34) ("... when the car is used in accordance with all terms and conditions of the rental agreement.") (made of record by the Examiner with the Office Action mailed on March 5, 2004; *see* Office form PTO-892, Cite U, mailed on December 5, 2003). True and correct copies of these two pages of Hertz, of record, are attached hereto in Appendix 2 (Evidence Appendix). This reference, which does not teach or suggest creating and displaying a rental proposal based upon reservation and rental-related information, accepting such rental proposal online, and displaying a rental agreement based upon such accepted rental proposal, favors the use of the term "rental agreement" over the term "rental contact" when contemplating a printed rental agreement.

On page 3, first paragraph of the Final Office Action, the Examiner states that Appellants are "not positively claiming rental contract". However, the evidence of record consistently supports Appellants' position that the recited claim term "rental agreement" ***means the same as*** "rental contract," which is legally binding on the parties entering into it.

Next, in that same paragraph, the Examiner cites Black's Law Dictionary's definition (p. 62) of the term "agreement":

> Although often used as synonymous with "contract", agreement is a broader term; *e.g.* an agreement might lack an essential element of a contract.

Here, there are three important portions of that definition to consider. First, the citation supports Appellants' position that "rental agreement" means the same as "rental contract" since it clearly states that the term "agreement" is "often used as synonymous with 'contract'".

Second, the citation's use of "might lack" clearly contemplates that the term "agreement" may have all of the essential elements of a contract.

Third, the Examiner points to the statement that "an agreement might lack an essential element of a contract" and states that "for an agreement (meeting of minds) to become a contract, there should be acceptance of the proposal."

Except for the fact that the claim term is "rental agreement," this clearly supports Appellants' position. For example, Claim 1 recites, in pertinent part: "creating and displaying a ***rental proposal*** based upon said reservation and said rental-related information; ***accepting said rental proposal online***; and ***displaying a rental agreement based upon said accepted rental proposal***." This recital makes clear that there is a rental proposal, that the rental proposal is accepted online, and that a rental agreement is displayed "based upon the accepted rental proposal". Hence, the context of the claim makes clear that there is acceptance of the rental proposal and that the term "rental agreement" is one and the same with "rental contract".

Since the proper focus for the meaning of a claim term is the ordinary and customary meaning attributed to it by those of ordinary skill in the relevant art, a claim term is not presumed to have all possible meanings attributed to it by an examiner or by Black's Law Dictionary.

The Court of Appeals for the Federal Circuit has made clear that:

> [i]mportantly, the person of ordinary skill in the art is deemed to read the claim term not only ***in the context of the particular claim in which the disputed term appears***, but ***in the context of the entire patent, including the specification***. ... It is the person of ordinary skill in the field of the invention through whose eyes the claims are construed. Such person is deemed to read the words used in the patent documents with an understanding of their meaning in the field, and to have knowledge of any special meaning and usage in the field. The inventor's words that are used to describe the invention—the inventor's lexicography—must be understood and interpreted by the court as they would be understood and interpreted by a person in that field of technology. Thus the court starts the decisionmaking process by reviewing the same resources as would that person, viz., the patent specification and the prosecution history.
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> * * *
>
> Because the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to "those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean." ... Those sources include "***the words of the claims***

> ***themselves, the remainder of the specification***, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art."
>
> * * *
>
> [J]udges are free to consult dictionaries and technical treatises at any time in order to better understand the underlying technology and may also rely on dictionary definitions when construing claim terms, ***so long as the dictionary definition does contradict any definition found in or ascertained by a reading of the patent documents***.

Phillips v. AWH Corp., 415 F.3d 1303, 1314, 1322-23, 75 U.S.P.Q.2d 1321, 1326-27, 1334 (Fed. Cir. 2005) (***emphasis added***).

The above makes crystal clear that the Examiner (using Black's Law Dictionary's definition of the single word "agreement" as opposed to properly construing the claim term "rental agreement" through the eyes of the "person of ordinary skill in the field of the invention") has not: (1) read the claim term "rental agreement" in the context of the words of Appellants' claims; and (2) read the claim term "rental agreement" in the context of the entire application, including the specification.

Again, the person of ordinary skill in the field of the invention through whose eyes (not the Examiner's eyes or Black's Law Dictionary's "eyes") the claims are construed, would consider the term "rental agreement" to be one and the same as "rental contract".[3] As to the first point, when construing the claim term "rental agreement," Black's Law Dictionary's definition of "agreement" being synonymous with "contract" does not contradict any definition ascertained by a reading of the Application. Appellants' claim language, for example, makes clear that such a construction is proper since there is a rental proposal, the rental proposal is accepted online, and a rental agreement is displayed "based upon the accepted rental proposal". However, the Examiner's use of the Black's Law Dictionary definition of "agreement" lacking an essential element of a contract (*i.e.*, acceptance of a proposal) is clearly in error without considering the context of the words of Appellants' claims.

As to the second point, in considering the meaning of "rental agreement" in the context of the entire Application, including the specification and the drawings, Appellants' specification, at page 26, lines 32-33, in connection with Figure 6L, clearly

[3] See, for example, Hertz (pp. 5 and 34) (***emphasis added***), which favors the term "rental agreement" when clearly contemplating a printed "rental contract" ("... when the car is used in accordance with all terms and conditions of the ***rental agreement***.").

recites (***emphasis added***) that "[t]he web page 484 further includes a "Print" button 510 to permit the customer to print the final ***rental agreement***." Moreover, as clearly shown in Figure 6L (***emphasis added***), the very same button 510 states "print ***contract***". Furthermore, Appellants' dictionary definition (of record) confirms Appellants' claim construction in view of the Application. Under this claim construction, which is through the eyes of the person of ordinary skill in the field of the invention, a "rental agreement" is one and the same as a rental contract which is legally binding on the parties entering into it.

In the Continuation Sheet of the Advisory Action mailed on December 15, 2006, the Examiner refers to Figure 6L and page 15, lines 12-13 of the specification ("A 'Print' button 110 permits the consumer to print the accepted rental contract.") and states that "[t]his statement alone states that [Appellants'] customer is provided a confirmation and not an actual contract as argued by the [Appellants]."

As set forth on page 26, lines 10-15 of the specification:

> By clicking on the object (*i.e.*, selecting the "Yes" button 480), the customer accepts the rental terms and conditions .... If the customer selects the "No" button 482, then the "reservation confirmation" web page 291 of Figure 6E is displayed. Otherwise, if the customer selects the "Yes" button 480, then the "rental confirmation" web page 484 of Figure 6L is displayed.

This makes clear that by clicking the "Yes" button 480, the customer accepts the rental terms and conditions and that the "rental confirmation" web page 484 of Figure 6L is displayed. Figure 6L ("print contract" 510) and the specification (page 15, lines 12-13) make clear that the consumer prints the accepted "rental contract".

In the Advisory Action Continuation Sheet, the Examiner argues that "Fig. 6L recites that printing done by using the print button is a confirmation".

It is important to note that Figure 6L deals with <u>two different</u> printings. At the left-hand side of the figure is the statement (<u>emphasis added</u>) that: "[y]ou can use your <u>browser's</u> print button to print a hard copy of this confirmation." This, however, is completely different than the web page "print contact" button 510 of Figure 6L (or the "Print" button 110 of Figure 3) that permits the consumer to print the accepted "rental contract". Again, the browser's print button is used to print the screen which shows the rental confirmation of Figure 6L. That is completely different than the web page buttons 110,510 that print the accepted "rental contract".

In the Advisory Action Continuation Sheet, the Examiner argues that "the contract as argued by the [Appellants] is not a complete contract but a confirmation of a rental agreement."

The Examiner cites no authority for this position and, also, confuses the confirmation shown in Figure 6L with the accepted "rental contract" that is printed by the web page buttons 110 (Figure 3), 510 (Figure 6L). The "print contact" button 510 does not state "print confirmation" as is apparently argued by the Examiner. Furthermore, the specification (page 15, lines 12-13) ("print the accepted rental contract") does not state that the "Print" button 110 (Figure 3) permits the consumer to print the "confirmation" as is also apparently argued by the Examiner.

In the Advisory Action Continuation Sheet, the Examiner states that "missing pages of the contract as argued by the [Appellants] ... will be presented to the customer at the rental facility".

Figure 6K, as part of the "terms and conditions" of the rental proposal, states that "I agree to the terms set forth below and any added pages, including the rental agreement jacket I will receive at the renting location." It is well-known in contract law that the parties to a contract have entered into a contract as long as they have agreed to material or essential terms, such as subject matter, quantity and price. "Even if the contract were indefinite as to some items, it must appear that such terms were so essential to the contract that it would be unfair to enforce the remainder." Palmer v. Aeolian Co., 46 F.2d 746, 753 (8th Cir. 1931) (a contract for one pipe organ for the price of $150,000 was definite and enforceable even though it was silent regarding terms directed to electric wiring and electrical connections for various organ components).

Figure 6L clearly shows that the material terms (*e.g.*, one "Sport Utility Vehicle", three "Additional Driver(s)", "Collision Damage Waiver", "Extended Protection", "Taxes, Surcharges and Fees" and "Total" price) have been agreed to by the parties. The subject matter is crystal clear—the rental of a sport utility vehicle including additional drivers, collision damage waiver and extended protection. The quantity is known since there is clearly one (1) such rental involving three (3) such additional drivers. Furthermore, the total price is exactly identified. Since the parties have agreed to the material and essential terms, along with other "terms set forth below", they have clearly entered into a contract.

Assuming, without admitting, that the Examiner might argue that the parties have left matters for future determination, those matters are clearly not the material or essential matters of subject matter, quantity and price as agreed to by the parties, as is

discussed in detail above. Also, the parties have expressly agreed to the "terms and conditions" ("I agree to the terms set forth below" of Figure 6K; "I have agreed to the terms and conditions of this rental agreement" of Figure 6L).

Moreover, as to the "missing pages" relied upon by the Examiner, the parties have still expressly agreed (***emphasis added***) ("***I agree to*** ... any added pages, including the rental agreement jacket I will receive at the renting location" of Figure 6K) to the definition of those matters.

In the Advisory Action Continuation Sheet, the Examiner twice states that "[Appellants argue] that the agreement is a contract but does not want to use the 'contract' in the claim. This itself makes clear that 'agreement' as argued by the [Appellants] is not a 'contract' as argued by the [appellants]."

Here, the Examiner errs since Appellants' use of the term "rental agreement" in the claims and Appellants' definition thereof (*i.e.*, rental contract which is legally binding on the parties entering into it) is entirely consistent with the interpretation that those of ordinary skill in the art would reach. Also, Appellants have never stated that they "do[] not want to use the [term] '[rental] contract' in the claim" as was argued, without support, by the Examiner. Hence, it cannot be said that "[t]his itself makes clear that [the term] '[rental] agreement' as argued by the [Appellants] is not a '[rental] contract' as argued by the [Appellants]." However, the Examiner's position makes clear that he has failed to properly consider the interpretation of the term "rental agreement" and give it the broadest "reasonable" interpretation consistent with the specification, as required by *In re Hyatt*, 211 F.3d 1367, 1372, 54 U.S.P.Q.2d 1664, 1667 (Fed. Cir. 2000), and consistent with the interpretation that those of ordinary skill in the art would reach, as required by *In re Cortright*, 165 F.3d 1353, 1359, 49 U.S.P.Q.2d 1464, 1468 (Fed. Cir. 1999).

In the Advisory Action Continuation Sheet, the Examiner states that "[Appellants are] arguing a contract not positively claimed by [Appellants], and now the contract is a legally binding contract which is also not positively claimed by the [Appellants]."

Again, Appellants' position is that the term "rental agreement" means the same as "rental contract," which is legally binding on the parties entering into it. Hence, if Appellants' position regarding the proper interpretation of that term is correct and the Examiner's position is incorrect, then the Examiner's position regarding a term being "positively claimed" is also incorrect.

In the Advisory Action Continuation Sheet, the Examiner states that Avis "discloses a reservation confirmation" and argues that "in Fig. 6L, [Appellants] also create[] a confirmation". Here, the Examiner errs because Figure 6L clearly deals with a "rental confirmation" which is quite different than the "reservation confirmation" of Avis. Furthermore, Appellants' claims, as set forth in Appendix 1, do not recite "confirmation".

Next, the Examiner errs when stating in the Final Office Action (page 6) that Hertz discloses a system and method for "completing a rental agreement online (Hertz asks users to secure reservation with a credit card) [page 68]", and that Hertz teaches "accepting said rental proposal online [page 69]".

Hertz (pages 67-69) teaches or suggests making a reservation online. Hertz (page 5) (emphasis added) makes clear the difference between its "reservation" "at time of reservation" and a "rental agreement" "at the time and place of rental". Clearly, Hertz contemplates an online reservation. A rental agreement only occurs later, when not ***online***, at the time (*i.e.*, "Pickup Date" and "Pickup Time" of Hertz, page 21) and place (*e.g.*, "Airport/OAG Code" of Hertz, page 21) of the rental. Although Hertz (pages 67-69) discloses that a user may make and secure a reservation online, a rental agreement is not taught or suggested until "at the time and place of rental," which does not occur ***online***.

Furthermore, the reservation of Hertz (pages 67-68) makes clear that "[a]pproximate rental charges are based on available information at time of reservation. Additional fees or surcharges may be applied at time of rental." Even though parties intend to form a contract, if the terms of their agreement are not sufficiently definite or reasonably certain, no contract will be said to exist. See, *e.g.*, Ault v. Pakulski, 520 A.2d 703 (Me. 1987); Bishop v. Hendrickson, 695 P.2d 1313 (Mont. 1985); North Coast Cookies, Inc. v. Sweet Temptations, Inc., 16 Ohio App. 3d 342, 476 N.E.2d 388 (1984); Arrowhead Constr. Co. v. Essex Corp., 233 Kan. 241, 662 P.2d 1195 (1983); Almeida v. Almeida, 4 Haw. App. 513, 669 P.2d 174 (1983); Porter v. Porter, 637 S.W.2d 396 (Mo. App. 1982). It is, therefore, crystal clear that there cannot be any "rental agreement" "online" because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price. Such a rental agreement in Hertz is not taught or suggested until "at the time and place of rental," which does not occur ***online***.

As to the Examiner's position that Hertz teaches "accepting said rental proposal online [page 69]," that page (emphasis added) expressly teaches "[t]o confirm your reservation with your charge card". Although the Examiner argued in a previous telephone interview that securing a reservation with a credit card would result in a hypothetical charge

to the user if the user did not show up "at the time and place of rental," there is no specific teaching in Hertz as to this point. Even if this is true, although this is not admitted, as was indicated above, there is no meeting of the minds between Hertz and the user as to exact price and to exact optional items associated with the reservation. See, for example, page 67 of Hertz, which shows that the user and Hertz have not yet agreed upon liability insurance, loss damage waiver, and personal property insurance. Those are clearly material terms to a rental agreement. The cases are legion in which courts have held that an "agreement to agree" upon a material term is not a contract. See, *e.g.*, Belitz v. Riebe, 495 So. 2d 775 (Fla. App. 1986); Gregory v. Perdue, Inc., 47 N.C. App. 655, 267 S.E.2d 584 (1980); Burgess v. Rodom, 121 Cal. App. 2d 71, 262 P.2d 335 (1953); Machesky v. City of Milwaukee, 214 Wis. 411, 253 N.W. 169 (1934); Sun Printing & Pub'g Ass'n v. Remington Paper & Power Co., 235 N.Y. 338, 139 N.E. 470 (1923). At best, the Examiner's hypothetical charge is associated with making and securing a reservation online and failing to complete a rental agreement "at the time and place of rental," which, as was discussed above, is not ***online.***

At page 3, second and third paragraphs of the Final Office Action, the Examiner responds to Appellants' argument that unlike the refined recital of Claim 1 (***emphasis added***) ("accepting said ***rental*** proposal online" and "displaying a ***rental agreement*** based upon said accepted ***rental proposal***"), "Hertz (pages 67-69) teaches or suggests making a reservation online."[4]

Hertz (page 5) makes clear that it provides its "reservation" "at time of reservation". Clearly, Hertz contemplates an online reservation.

Hertz (page 5) (emphasis added) makes clear that there is a "rental agreement" "at the time and place of rental". Hence, in Hertz, a rental agreement only occurs later, when not online, at the time (*i.e.*, "Pickup Date" and "Pickup Time" of Hertz, page 21) and place (*e.g.*, "Airport/OAG Code" of Hertz, page 21) of the rental.

Although Hertz (pages 33, 67-69) and Avis both disclose that a user may make and secure a reservation online, a rental agreement is not taught or suggested until "at the time and place of rental," which does not occur online. The "terms and conditions of online reservation of a car" add nothing about accepting a ***rental*** proposal online.

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[4] Appellants are clearly not "arguing a limitation not positively claimed" as is stated by the Examiner. Instead, Appellants are properly presenting arguments why the references do not teach or suggest Appellants' claim recitals, namely, that they do not teach or suggest accepting a rental proposal online and displaying a rental agreement based upon such accepted rental proposal.

Clearly, Hertz and Avis, whether taken alone or in combination, do not teach or suggest accepting a ***rental*** proposal online, much less displaying a ***rental agreement*** based upon such accepted rental proposal.

At page 3, fourth and fifth paragraphs of the Final Office Action, the Examiner responds to Appellants' argument that Hertz does not teach or suggest accepting a ***rental*** proposal online and displaying a ***rental agreement*** based upon such accepted rental proposal as recited, for example, by Claim 1.[5] One reason that Hertz does not teach or suggest this recital is that there is no meeting of the minds between Hertz and the user as to exact price and to exact optional items associated with the reservation. Hence, there can be no display of a rental agreement (*i.e.*, "rental contract," which is legally binding on the parties entering into it) based upon any accepted rental proposal.

The Examiner also errs in stating that Avis discloses "displaying a rental agreement based upon [an] accepted rental proposal [page 10]."

Avis, which discloses (pages 2-5, 8 and 9) an online reservation and (page 10) a reservation confirmation, adds nothing to Hertz regarding the refined recital of Claim 1. Avis discloses a reservation confirmation rather than displaying a ***rental agreement*** based upon an ***online*** accepted rental proposal. Avis merely teaches an online reservation confirmation and, later, while not ***online***, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Avis does not teach or suggest and, in fact, teaches away from display of a ***rental agreement*** based upon an ***online*** accepted rental proposal. Hence, Avis does not teach or suggest and adds nothing to Hertz regarding displaying a rental agreement based upon an online accepted rental proposal as was asserted by the Examiner.

The Examiner concludes in the Final Office Action (page 6) that it would have been obvious to modify Hertz as taught by Avis "to provide confirmation message to customer, allow customer to verify information and make changes to the reservation etc.". This, however, confirms the understanding that Avis merely teaches an online reservation confirmation. Later, while not online, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Accordingly, Avis does not teach or suggest and adds nothing to Hertz regarding ***displaying*** a ***rental agreement*** based upon an online accepted rental proposal as was asserted by the Examiner.

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[5] Again, Appellants are clearly not "arguing a limitation not positively claimed" as is stated by the Examiner. Instead, Appellants are properly presenting arguments why the references do not teach or suggest Appellants' claim recitals.

With regard to the first test of *In re Sernaker*, the cited references, taken as a whole, do not teach or suggest, either expressly or by implication, the possibility of achieving further improvement by combining their teachings along the line of Appellants' invention which comprises creating and displaying a rental proposal based upon reservation and rental-related information, accepting such rental proposal online, and displaying a rental agreement based upon such accepted rental proposal. Although the references teach or suggest a reservation proposal, the references, whether taken alone or in combination, do not teach or suggest the refined recital of Claim 1. Accordingly, the Examiner errs under the first question of *In re Sernaker*.

Furthermore, as to the second test of *In re Sernaker*, the subject invention achieves more than a combination suggested, either expressly or by reasonable implication, by the cited references. The references, taken as a whole, do not teach or suggest a rental agreement (*i.e.*, a rental contract, which is legally binding on the parties entering into it) in combination with the recited creating and displaying a rental proposal based upon reservation and rental-related information, accepting such rental proposal online, and displaying such rental agreement based upon such accepted rental proposal. Therefore, the Examiner errs under the second question of *In re Sernaker*. Accordingly, under either or both of the two tests, the claimed invention is not obvious in light of the references.

Accordingly, for the above reasons, Claim 1 patentably distinguishes over the references.

Claims 2-5, 11-21, 25-32, 36 and 37 depend directly or indirectly from Claim 1 and patentably distinguish over the references for the same reasons.

It is not disputed that kioskcom.com adds nothing to Hertz and Avis to render Claim 1 unpatentable. Claim 10 depends from Claim 1 and patentably distinguishes over the references for the same reasons.

Claim 4

As to Claim 4, the Examiner errs when stating (Final Office Action, page 7), without any support, that Appellants do "not positively claim element b of claim 1".

Claim 4 depends from Claim 1 and includes all of the limitations thereof. Claim 1 recites five (5) elements. The first of those elements recites entering reservation-related information and rental-related information for an item or service, the entering step ***entering***: (a) the rental-related information without employing a master rental agreement, ***or*** (b) at least some of the rental-related information from a master rental agreement and allowing modification of the information from the master rental agreement for rental of the

item or service without modifying the master rental agreement. It is clear that Appellants positively recite ***entering*** "the rental-related information without employing a master rental agreement" ***or*** "at least some of the rental-related information from a master rental agreement and allowing modification of the information from the master rental agreement for rental of the item or service without modifying the master rental agreement".

Moreover, Claim 4 expressly recites entering at least some of the rental-related information from a master rental agreement; and allowing modification of the information from the master rental agreement for rental of the item or service without modifying the master rental agreement. In view of this express recital, it is clear error for the Examiner to state (Final Office Action, page 7) that the recital "entering at least some of said rental-related information from a master rental agreement" of Claim 4 "is not given any patentable weight".

As set forth in the present specification at page 3, lines 2-6, known conventional reservation methods and systems do not permit a user to complete an online rental agreement with rental-related information that is different from that which is contained in the master rental agreement.

As is also set forth in the present specification at page 31, line 32 through page 32, lines 6, under Claim 4, a user having a master rental agreement for business (or other) purposes may still employ some of the user profile information from that master rental agreement, and modify some of that profile information for a personal vehicle rental, without modifying the business-related master rental agreement.

The ultimate determination of patentability is based on the entire record, by a preponderance of evidence, with due consideration to the persuasiveness of any arguments and any secondary evidence. *In re Oetiker*, 977 F.2d 1443, 24 U.S.P.Q.2d 1443 (Fed. Cir. 1992).

The legal standard of "a preponderance of evidence" requires the evidence to be more convincing than the evidence which is offered in opposition to it. A preponderance of the evidence exists when it suggests that it is more likely than not that the assertion in question is true. *Herman v. Huddleston*, 459 U.S. 375, 390 (1983).

With regard to rejections under 35 U.S.C. § 103(a), the examiner must provide evidence which, as a whole, shows that the legal determination sought to be proved (*i.e.*, the reference teachings establish a prima facie case of obviousness) is more probable than not. MPEP § 2142 (p. 2100-134).

The Examiner has not shown that his position is more probable than Appellants' position. Beyond this, the Examiner has not met the requisite burden and has made improper use of speculative hindsight, as will be discussed.

At page 4, first and second paragraphs of the Final Office Action, the Examiner refers to Appellants' arguments in connection with Claim 4. Here, the Examiner relies upon Hertz (page 17) which discloses that "[i]f you're a Hertz #1 Club® or a Hertz #1 Club Gold® member you can use some or all of the information (including the credit card number) contained in your rental profile" to make a reservation. The Examiner, without support, argues that it is inherent that previously stored information is not modified when it is used to complete another transaction for that renter.

Hertz (page 17) discloses that "[i]f you're a Hertz #1 Club® or a Hertz #1 Club Gold® member you can use some or all of the information (including the credit card number) contained in your rental profile" to make a reservation.

Hertz (page 27) discloses that "[i]f you're a Hertz #1 Club® or a Hertz #1 Club Gold® member you can use information (including the credit card number) contained in your rental profile" to make a reservation. Furthermore, Hertz (page 27) (emphasis in the original) discloses that "[y]ou can also update your Hertz #1 Gold profile online." See, also, Hertz (page 35) ("select Profile Updates").

This makes clear that the only three possibilities in Hertz are to: (1) update your Hertz #1 Gold profile online and then make a reservation (clearly, this modifies the master rental agreement); (2) make a reservation using all of the information (including the credit card number) contained in the profile (clearly, this does not allow modification of information from a master rental agreement); and (3) make a reservation using some of the information contained in the profile and modify the profile (clearly, this modifies the master rental agreement). Furthermore, the Examiner presents no argument to rebut Appellants' position that there are only these three possibilities in Hertz.

There is no teaching or suggestion in Hertz of the refined recital of entering at least some of rental-related information from a master rental agreement and allowing modification of such information from such master rental agreement for rental of an item or service ***without modifying such master rental agreement*** in combination with the refined recital of Claim 1. The Examiner makes no citation to Hertz in this regard.

It is not disputed that rental-related information may be entered from a master rental agreement and that such entered information may be modified. Stated another way, the user would be motivated to correct the source of the incorrect information in the master rental

agreement and, thus, would modify the master rental agreement to do so. This view is at least as equally plausible as the Examiner's position. Where in the references does it state that a user would not modify a master rental agreement when modifying entered information from a master rental agreement for rental of an item or service? The Examiner improperly employs hindsight to reach this conclusion.

The Examiner has the burden of proof by a preponderance of the evidence. Appellants' position is at least as plausible, if not more plausible, than that of the Examiner's position. Clearly, Hertz does not teach or suggest the refined recital of entering reservation-related information and rental-related information for an item or service, in which an entering step enters at least some of such rental-related information from a master rental agreement and ***allows modification of information from such master rental agreement for rental of such item or service without modifying such master rental agreement***; creating and displaying a rental proposal based upon a reservation and such rental-related information; accepting such rental proposal online; and displaying a rental agreement based upon such accepted rental proposal.

It is not disputed that Avis adds nothing to Hertz in this regard.

Therefore, for the above reasons, Claim 4 further patentably distinguishes over the references.

Claim 17

Claims 17-19 depend directly or indirectly from Claim 16 and include all of the limitations of Claims 1, 15, 16 and any intervening claim.

In connection with Claim 17, the Examiner refers (Final Office Action, page 8) to pages 24 and 25 of Hertz, which respectively disclose the United States Fleet of Hertz and an economy class car thereof. Those web pages have nothing to do with completing a rental agreement online; entering reservation-related information and rental-related information for an item or service; providing a reservation for such item or service based at least in part upon such reservation-related information; creating and displaying a rental proposal based upon such reservation and such rental-related information; accepting such rental proposal online; and displaying a rental agreement based upon such accepted rental proposal.

The Examiner errs in connection with Claim 17 since Hertz does not teach or suggest the refined recital of selecting a capacity of a vehicle in the recited reservation-related information. See, for example, the reservation process of Hertz (pages 17-21 and 62-69).

Furthermore, the Examiner's reliance upon the advertisement of Hertz (page 25) is misplaced since that advertisement is not part of Hertz's reservation process.

It is not disputed that Avis adds nothing to Hertz in this regard.

Hence, Claim 17 further patentably distinguishes over the references.

Claim 32

Claim 32 depends from Claim 1 and includes all of the limitations thereof.

The Examiner errs in connection with Claim 32 since Hertz does not teach or suggest displaying rental terms and conditions in a ***rental*** proposal that is accepted online.

Hertz (page 67) discloses an unconfirmed reservation. It is not disputed that Avis adds nothing to Hertz in this regard. Therefore, Claim 32 further patentably distinguishes over the references.

The Examiner takes the position (Final Office Action, page 4), apparently in connection with Claim 32, that Appellants argue a limitation that is "no[t] positively recited".

Clearly, here, Appellants present arguments to the positively recited elements of Claim 32 and properly explain why the references do not teach or suggest the refined recital thereof.

Claim 36

Claim 36 depends from Claim 1 and includes all of the limitations thereof.

The Examiner errs in connection with Claim 36 since Hertz does not teach or suggest modifying the recited ***rental agreement*** of Claim 1.

Hertz (page 17) discloses that a reservation can be modified or cancelled online; Hertz (page 11) discusses gasoline. It is not disputed that Avis adds nothing to Hertz in this regard. Accordingly, Claim 36 further patentably distinguishes over the references.

Claim 38

The Examiner errs in connection with Claim 38 since Hertz does not teach or suggest under control of a client system, sending first information and second information to a server system, receiving from such server system a rental proposal based upon such first information and such second information, displaying such rental proposal, and accepting such ***rental*** proposal ***online*** to ***complete*** a ***rental agreement***.

Hertz teaches or suggests making a reservation online. As was discussed in greater detail, above in connection with Claim 1, Hertz does not teach or suggest any "rental agreement" "online" because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price. Such a rental agreement in Hertz is not taught or

suggested until "at the time and place of rental," which does not occur ***online***. Hertz (pages 67-69) discloses an unconfirmed reservation and a reservation confirmation.

Avis, which discloses (pages 2-5, 8 and 9) an online reservation and (page 10) a reservation confirmation, adds nothing to Hertz regarding the refined recital of Claim 38. Avis discloses a reservation confirmation rather than accepting a ***rental*** proposal ***online*** to ***complete*** a ***rental agreement***. Avis merely teaches an online reservation confirmation and, later, while not ***online***, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Avis does not teach or suggest and, in fact, teaches away from accepting a ***rental*** proposal online to ***complete*** a ***rental agreement***. Hence, Avis does not teach or suggest and adds nothing to Hertz regarding this refined recital.

Therefore, for the above reasons, Claim 38 patentably distinguishes over the references.

Claims 39-42 depend directly or indirectly from Claim 38 and patentably distinguish over the references for the same reasons.

Claim 39

Claim 39 depends from Claim 38 and includes all of the limitations thereof.

The Examiner errs in connection with Claim 39 since Hertz does not teach or suggest including terms and conditions in a rental proposal; displaying an object; selecting such displayed object to accept such terms and conditions; and including such terms and conditions in a ***rental agreement***.

Hertz (pages 67-69) discloses an unconfirmed reservation and a reservation confirmation. The Examiner states (Final Office Action, page 14) that Hertz does not teach or suggest including terms and conditions in a rental agreement. The Examiner further states that Avis discloses "terms and conditions in the rental agreement [page 10, 11]".

Actually, Avis (pages 10 and 11), which shows a reservation confirmation, clearly adds nothing to Hertz regarding any terms and conditions in a ***rental agreement*** within the context of the claims. Since the references do not teach or suggest the recited rental proposal, which is accepted online to complete the rental agreement, of Claim 38, they clearly neither teach nor suggest these additional limitations of including terms and conditions in a rental proposal, displaying an object, selecting such displayed object to accept such terms and conditions, and including such terms and conditions in a rental agreement, which further patentably distinguish over the references.

Claim 40

Claim 40 depends from Claim 38 and includes all of the limitations thereof.

The Examiner errs in connection with Claim 40 since Hertz does not teach or suggest generating a ***rental agreement*** at a server system based upon an accepted rental proposal.

The Examiner states (Final Office Action, page 14) that Hertz does not disclose this recital and relies upon Avis.

Avis (page 12) discloses reviewing a reservation by keeping or canceling it. Avis does not teach or suggest any ***rental agreement*** within the context of the claims and adds nothing to Hertz in this regard.

The Examiner states (Final Office Action, page 14) that it would have been obvious to modify Hertz as taught by Avis to "include the contents of the proposal in its entirety and create a binding agreement."

Here, the Examiner errs since Avis (page 12) discloses reviewing a reservation by keeping (Keep It!) or canceling (Cancel It!) it. There is no teaching or suggestion of any binding ***rental agreement*** (*i.e.*, rental contract) within the context of the claims as was asserted by the Examiner.

Since the references do not teach or suggest the recited rental proposal, which is accepted online to complete the rental agreement, of Claim 38, they clearly neither teach nor suggest these additional limitations of generating a rental agreement at a server system based upon an accepted rental proposal, which further patentably distinguish over the references.

Claim 43

The Examiner errs in connection with Claim 43 since Hertz does not teach or suggest a client system entry component entering second information pertaining to rental of an item or service; a processor component cooperating with such entry component; a communication component, responsive to such processor component, sending first and such second information to a server system, and receiving from such server system a rental proposal responsive to such sent first and second information; and a display component displaying such rental proposal, such entry component and such processor component cooperating to initiate acceptance of such rental proposal, and such communication component, responsive to such acceptance, sending such acceptance to such server system, in order to complete such rental agreement online.

Hertz teaches or suggests making a reservation online. However, Hertz does not teach or suggest any "rental agreement" "online" because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price. Such a rental

agreement in Hertz is not taught or suggested until "at the time and place of rental," which does not occur ***online***.

Avis, which discloses (pages 2-5, 8 and 9) an online reservation and (page 10) a reservation confirmation, adds nothing to Hertz regarding the refined recital of Claim 43. Avis discloses a reservation confirmation rather than an entry component and a processor component cooperating to initiate acceptance of a ***rental*** proposal, and a communication component, responsive to such acceptance, sending such acceptance to a server system, in order to ***complete*** a ***rental agreement online***. Avis merely teaches an online reservation confirmation and, later, while not ***online***, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Avis does not teach or suggest and, in fact, teaches away from an entry component and a processor component cooperating to initiate acceptance of a ***rental*** proposal, and a communication component, responsive to such acceptance, sending such acceptance to a server system, in order to ***complete*** a ***rental agreement online***. Hence, Avis does not teach or suggest and adds nothing to Hertz regarding this refined recital.

Accordingly, for the above reasons, Claim 43 patentably distinguishes over the references.

Claims 44-48 depend directly or indirectly from Claim 43 and patentably distinguish over the references for the same reasons.

Claim 49

The Examiner errs in connection with Claim 49 since Hertz does not teach or suggest a server system for completing a rental agreement with a client system, the server system comprising: a rental component generating a rental proposal based upon reservation and received second information, sending such rental proposal to a client system, and receiving an acceptance of such rental proposal from such client system, in order to complete such rental agreement online.

Hertz teaches or suggests making a reservation online. However, Hertz does not teach or suggest completing any "rental agreement" "online" because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price. Such a rental agreement in Hertz is not taught or suggested until "at the time and place of rental," which does not occur online.

Avis, which discloses (pages 2-5, 8 and 9) an online reservation and (page 10) a reservation confirmation, adds nothing to Hertz regarding the refined recital of Claim 49. Avis discloses a reservation confirmation rather than sending a rental proposal to a client

system, and receiving an acceptance of such ***rental*** proposal from such client system, in order to ***complete*** a ***rental agreement online***. Avis merely teaches an online reservation confirmation and, later, while not ***online***, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Avis does not teach or suggest and, in fact, teaches away from sending a ***rental*** proposal to a client system, and receiving an acceptance of such ***rental*** proposal from such client system, in order to ***complete*** a ***rental agreement online***. Hence, Avis does not teach or suggest and adds nothing to Hertz regarding this refined recital.

Accordingly, for the above reasons, Claim 49 patentably distinguishes over the references.

Claims 50-52 depend directly or indirectly from Claim 49 and patentably distinguish over the references for the same reasons.

Claim 53

The Examiner errs in connection with Claim 53 since Hertz does not teach or suggest receiving from a server system a rental proposal responsive to sent first and second information; displaying such rental proposal; accepting such rental proposal; and sending such acceptance to such server system, in order to complete a rental agreement online.

Hertz teaches and suggests making a reservation online. However, Hertz does not teach or suggest any "rental agreement" "online" because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price. Such a rental agreement in Hertz is not taught or suggested until "at the time and place of rental," which does not occur online.

Avis, which discloses (pages 2-5, 8 and 9) an online reservation and (page 10) a reservation confirmation, adds nothing to Hertz regarding the refined recital of Claim 53. Avis discloses a reservation confirmation rather than displaying a ***rental*** proposal, accepting such ***rental*** proposal, and sending such acceptance to a server system, in order to ***complete*** a ***rental agreement online***. Avis merely teaches an online reservation confirmation and, later, while not ***online***, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Avis does not teach or suggest and, in fact, teaches away sending an acceptance to a server system, in order to ***complete*** a ***rental agreement online***. Hence, Avis does not teach or suggest and adds nothing to Hertz regarding this refined recital.

Therefore, for the above reasons, Claim 53 patentably distinguishes over the references.

Claim 54

The Examiner errs in connection with Claim 54 since Hertz does not teach or suggest generating a rental proposal based upon reservation and received second information; sending such rental proposal to a client system; and receiving an acceptance of such rental proposal from such client system, in order to complete a rental agreement online.

Hertz teaches or suggests making a reservation online. However, Hertz does not teach or suggest any "rental agreement" "online" because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price. Such a rental agreement in Hertz is not taught or suggested until "at the time and place of rental," which does not occur online.

Avis, which discloses (pages 2-5, 8 and 9) an online reservation and (page 10) a reservation confirmation, adds nothing to Hertz regarding the refined recital of Claim 54. Avis discloses a reservation confirmation rather than sending a ***rental*** proposal to a client system, and receiving an acceptance of such ***rental*** proposal from such client system, in order to ***complete*** such ***rental agreement online***. Avis merely teaches an online reservation confirmation and, later, while not ***online***, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Avis does not teach or suggest and, in fact, teaches away from sending a ***rental*** proposal to a client system, and receiving an acceptance of such ***rental*** proposal from such client system, in order to ***complete*** such ***rental agreement online***. Hence, Avis does not teach or suggest and adds nothing to Hertz regarding this refined recital.

Hence, for the above reasons, Claim 54 patentably distinguishes over the references.

Claim 55

The Examiner errs in connection with Claim 55 since Hertz does not teach or suggest a client sub-system receiving from a server sub-system a rental proposal responsive to sent first and second information, a display component displaying such rental proposal, an entry component and a processor component cooperating to initiate acceptance of such rental proposal, and a communication component, responsive to such acceptance, sending such acceptance to such server sub-system; and such server sub-system comprising: a rental component generating a rental proposal based upon reservation and received second information, and a processor component cooperating with such communication component and such rental component to send such rental proposal to such client sub-system and to

receive an acceptance of such rental proposal from such client sub-system, in order to complete a rental agreement online.

Hertz (page 17) teaches or suggests making a reservation online. However, Hertz does not teach or suggest any "rental agreement" "online" because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price. Such a rental agreement in Hertz is not taught or suggested until "at the time and place of rental," which does not occur online.

Avis, which discloses (pages 2-5, 8 and 9) an online reservation and (page 10) a reservation confirmation, adds nothing to Hertz regarding the refined recital of Claim 55. Avis discloses a reservation confirmation rather than sending a ***rental*** proposal to a client sub-system and receiving an acceptance of such ***rental*** proposal from such client sub-system, in order to ***complete*** a ***rental agreement online***. Avis merely teaches an online reservation confirmation and, later, while not ***online***, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Avis does not teach or suggest and, in fact, teaches away from sending a ***rental*** proposal to a client sub-system and receiving an acceptance of such ***rental*** proposal from such client sub-system, in order to ***complete*** a ***rental agreement online***. Hence, Avis does not teach or suggest and adds nothing to Hertz regarding this refined recital.

Accordingly, for the above reasons, Claim 55 patentably distinguishes over the references.

Claims 56-60 and 62-64 depend directly or indirectly from Claim 55 and patentably distinguish over the references for the same reasons.

It is not disputed that kioskcom.com adds nothing to Hertz and Avis to render Claim 60 unpatentable. Claim 61 depends from Claim 60 and patentably distinguishes over the references for the same reasons.

It is not disputed that CERT adds nothing to Hertz and Avis to render Claim 55 unpatentable. Claim 65 depends from Claim 55 and patentably distinguishes over the references for the same reasons.

Claim 6

Claim 6 depends from Claim 1 and includes all of the limitations thereof.

The Examiner errs in connection with Claim 6 since the references do not teach or suggest maintaining a history of rental information for prior rentals by a user; entering information from an identification of a user; and entering at least some of the rental-

related information from the history based upon the information from an identification of a user without employing a master rental agreement.

It is not disputed that Freeman, which discloses banking and credit card transactions, adds nothing to Hertz and Avis to render Claim 1 unpatentable.

The Examiner errs because there is no teaching or suggestion in Freeman of maintaining a ***history*** of ***rental*** information for ***prior rentals*** by a user; entering information from an identification of a user; and entering at least some of rental-related information ***from*** such ***history based upon*** such ***information from*** an identification of a user without employing a master rental agreement.

It is not disputed that Hertz and Avis add nothing to Freeman regarding maintaining a history of rental information for prior rentals by a user; and entering at least some of such rental-related information from such history based upon information from an identification of a user without employing a master rental agreement.

Hence, Claim 6 further patentably distinguishes over the references.

Claim 35

Claim 35 depends directly or indirectly from Claims 34, 33 and 1 and includes all of the limitations thereof.

The Examiner errs in connection with Claim 35 since the references do not teach or suggest linking from an e-mail message to a web page to complete a rental agreement.

The Examiner states (Final Office Action, page 33) that Markbaul "teaches access to information at remote location after receiving of e-mail message with a link to information."

The web site from Markbaul at http://home.earthlink.net/~markbau/ is apparently not currently accessible. This web site might have shown pictures of trains, although that is not apparent from the single page made of record by the Examiner. Clearly, Markbaul does not teach or suggest the refined recital of linking from an e-mail message to a web page to ***complete*** a ***rental agreement.***

The Examiner further states that Markbaul discloses "access to information at remote location after receiving of e-mail message to minimize user typing the URL to access the information, to expedite user getting access to the information."

However, mere access to information, such as access to pictures of trains, and minimizing typing does not teach or suggest the refined recital of linking from an e-mail message to a web page to ***complete*** a ***rental agreement.***

It is not disputed that Hertz, Avis and TravelWeb add nothing to Markbaul regarding the refined recital of Claim 35. Accordingly, Claim 35 further patentably distinguishes over the references.

Claim 66

The Examiner errs in connection with Claim 66 since the references do not teach or suggest creating and displaying a rental proposal based upon reservation and rental-related information; accepting such rental proposal online; and displaying such rental agreement based upon such accepted rental proposal.

Hertz (page 17) teaches or suggests making a reservation online. However, Hertz does not teach or suggest any "rental agreement" "online" because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price. Such a rental agreement in Hertz is not taught or suggested until "at the time and place of rental," which does not occur online.

Avis, which discloses (pages 2-5, 8 and 9) an online reservation and (page 10) a reservation confirmation, adds nothing to Hertz regarding the above refined recital of Claim 66. Avis discloses a reservation confirmation rather than displaying a ***rental agreement*** based upon an ***online*** accepted rental proposal. Avis merely teaches an online reservation confirmation and, later, while not ***online***, an Avis-honored charge card or an Avis Cash Pre-payment Card is "required at the beginning of the rental". Avis does not teach or suggest and, in fact, teaches away from display of a ***rental agreement*** based upon an ***online*** accepted rental proposal. Hence, Avis does not teach or suggest and adds nothing to Hertz regarding this refined recital.

Robinson, which discloses an ATM machine at a staffed rental counter and prints out a contract on the rental agent's side, adds nothing to Hertz and Avis regarding the above refined recital of Claim 66.

Therefore, for the above reasons, Claim 66 patentably distinguishes over the references.

Claims 67-73 depend directly or indirectly from Claim 66 and patentably distinguish over the references for the same reasons.

Claim 67

The Examiner errs in connection with Claim 67 since the references do not teach or suggest displaying a rental proposal at a client system; and accepting such rental proposal at such client system to complete a rental agreement.

Hertz (pages 67-69) discloses an unconfirmed reservation and a reservation confirmation. It is not disputed that Avis adds nothing to Hertz in this regard. These references do not teach or suggest the refined recital of accepting a ***rental*** proposal at a client system to ***complete*** a ***rental agreement***. Accordingly, Claim 67 further patentably distinguishes over the references.

Conclusion

Claims 1-21 and 25-73 are patentable over the prior art of record. Therefore, it is requested that the Board reverse the Examiner's rejections of Claims 1-21 and 25-73 and remand the application to the Examiner for the issuance of a Notice of Allowance.

Respectfully submitted,

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APPENDIX 1 (Claims Appendix)

1. A method for completing a rental agreement online, said method comprising the steps of:

entering reservation-related information and rental-related information for an item or service, said entering step entering: (a) said rental-related information without employing a master rental agreement, or (b) at least some of said rental-related information from a master rental agreement and allowing modification of said information from the master rental agreement for rental of said item or service without modifying the master rental agreement;

providing a reservation for said item or service based at least in part upon said reservation-related information;

creating and displaying a rental proposal based upon said reservation and said rental-related information;

accepting said rental proposal online; and

displaying a rental agreement based upon said accepted rental proposal.

2. The method of Claim 1 further comprising:

entering said rental-related information without employing a master rental agreement.

3. The method of Claim 2 further comprising:

manually entering said rental-related information online.

4. The method of Claim 1 further comprising:

entering at least some of said rental-related information from a master rental agreement; and

allowing modification of said information from the master rental agreement for rental of said item or service without modifying the master rental agreement.

5. The method of Claim 4 further comprising:

entering at least one of a member identification and a user name to identify said master rental agreement.

6. The method of Claim 1 further comprising:

maintaining a history of rental information for prior rentals by a user;

entering information from an identification of a user; and

entering at least some of said rental-related information from the history based upon said information from an identification of a user without employing a master rental agreement.

7. The method of Claim 6 further comprising:

employing a driver's license as said identification.

8. The method of Claim 6 further comprising:

provisionally entering at least some of said rental-related information from the history.

9. The method of Claim 8 further comprising:

modifying at least some of said provisionally entered at least some of said rental-related information from the history.

10. The method of Claim 1 further comprising:

displaying said rental proposal at at least one of a client system and a kiosk; and

accepting said rental proposal at one of said client system and said kiosk.

11. The method of Claim 1 further comprising:

renting a vehicle under said rental agreement.

12. The method of Claim 1 further comprising:

providing time and location information regarding a vehicle rental in said reservation-related information.

13. The method of Claim 12 further comprising:

employing at least some of pick-up location, pick-up date, pick-up time, drop-off location, drop-off date, and drop-off time as said time and location information.

14. The method of Claim 1 further comprising:

providing arrival information in said rental-related information.

15. The method of Claim 1 further comprising:

providing rental rate requests in said reservation-related information.

16. The method of Claim 15 further comprising:

selecting a vehicle for reservation in said reservation-related information.

17. The method of Claim 16 further comprising:

selecting a capacity of said vehicle in said reservation-related information.

18. The method of Claim 17 further comprising:

employing at least one of luggage capacity and passenger capacity as said capacity of said vehicle.

19. The method of Claim 18 further comprising:

displaying at least one of an image of said vehicle, a class of said vehicle, and a rental price for said vehicle prior to said step of selecting a capacity of said vehicle.

20. The method of Claim 1 further comprising:

providing information regarding a user in said rental-related information.

21. The method of Claim 20 further comprising:

employing at least one of e-mail address, telephone number, residence, driver's license information, travel contact information, and frequent flyer information in said information regarding a user.

22. (Canceled)

23. (Canceled)

24. (Canceled)

25. The method of Claim 1 further comprising:

employing optional information in said rental-related information.

26. The method of Claim 25 further comprising:

selecting at least one of a plurality of rental options in said optional information; and

updating rental cost information based upon said selected rental options.

27. The method of Claim 26 further comprising:

recalculating said rental cost information and sending a corresponding transaction to a mainframe computer.

28. The method of Claim 25 further comprising:

employing at least one of insurance coverage and prepaid fuel in said optional information.

29. The method of Claim 28 further comprising:

employing at least one of collision damage waiver and extended insurance in said insurance coverage.

30. The method of Claim 25 further comprising:

employing at least one of an additional driver, an underage driver, collision damage insurance protection, extended insurance protection, prepaid fuel, a child safety seat, and a stroller in said optional information.

31. The method of Claim 1 further comprising:

displaying rental pricing information in said rental proposal.

32. The method of Claim 1 further comprising:

displaying rental terms and conditions in said rental proposal.

33. The method of Claim 1 further comprising:

sending an e-mail message to confirm said reservation after entering said reservation-related information and providing said reservation.

34. The method of Claim 33 further comprising:

entering said rental-related information before sending said e-mail message.

35. The method of Claim 34 further comprising:

linking from said e-mail message to a web page to complete said rental agreement.

36. The method of Claim 1 further comprising:

modifying said rental agreement.

37. The method of Claim 1 further comprising:

modifying said reservation.

38. A method for completing a rental agreement between a client system and a server system, said method comprising the steps of:

under control of the client system,

entering first information pertaining to a reservation of an item or service, and second information pertaining to a rental of said item or service, said entering step entering: (a) said second information without employing a master rental agreement, or (b) at least some of said second information from a master rental agreement

and allowing modification of said second information from the master rental agreement for rental of said item or service without modifying the master rental agreement,

sending said first information and said second information to the server system,

receiving from said server system a rental proposal based upon said first information and said second information,

displaying said rental proposal, and

accepting said rental proposal online to complete said rental agreement; and

under control of the server system,

receiving said first information and said second information from said client system,

providing a reservation based at least in part upon said first information,

generating the rental proposal based upon said reservation and said second information, and

sending the rental proposal to the client system.

39. The method of Claim 38 further comprising:

including terms and conditions in the rental proposal;

displaying an object;

selecting said displayed object to accept said terms and conditions; and

including said terms and conditions in the rental agreement.

40. The method of Claim 38 further comprising:

generating the rental agreement at the server system based upon said accepted rental proposal.

41. The method of Claim 40 further comprising:

sending the rental agreement from the server system to the client system; and

displaying the rental agreement at the client system.

42. The method of Claim 38 further comprising:

renting a vehicle under the rental agreement.

43. A client system for completing a rental agreement with a server system, said client system comprising:

an entry component entering first information pertaining to a reservation of an item or service, and entering second information pertaining to a rental of said item or service, said entering step entering: (a) said second information without employing a master rental agreement, or (b) at least some of said second information from a master rental agreement and allowing modification of said second information from the master rental agreement for rental of said item or service without modifying the master rental agreement;

a processor component cooperating with said entry component;

a communication component, responsive to said processor component, sending said first and second information to the server system, and receiving from said server system a rental proposal responsive to said sent first and second information; and

a display component displaying said rental proposal,

said entry component and said processor component cooperating to initiate acceptance of said rental proposal, and

said communication component, responsive to said acceptance, sending said acceptance to the server system, in order to complete the rental agreement online.

44. The client system of Claim 43 wherein the display component is a browser, which displays said rental proposal.

45. The client system of Claim 44 wherein said communication component receives an HTML document provided by the server system; and wherein said processor component processes said HTML document for display by said display component.

46. The client system of Claim 43 wherein said item or service includes a vehicle rental.

47. The client system of Claim 43 wherein said item is a vehicle.

48. The client system of Claim 43 wherein said rental proposal is sent as an HTML document as provided by the server system; and wherein said processor component processes said HTML document for display by said display component.

49. A server system for completing a rental agreement with a client system, said server system comprising:

a data storage component storing information for a plurality of items or services;

a communication and processing component receiving first information pertaining to a reservation of an item or service from the client system, and receiving second information pertaining to a rental of said item or service from the client system;

a reservation component retrieving stored information from said data storage component for said items or services, and providing a reservation based at least in part upon said first information and the retrieved stored information; and

a rental component generating a rental proposal based upon said reservation and said received second information, sending the rental proposal to the client system, and receiving an acceptance of the rental proposal from the client system, in order to complete the rental agreement online, said rental component receiving: (a) said second information without employing a master rental agreement, or (b) at least some of said second information from a master rental agreement and allowing modification of said second information from the master rental agreement for rental of said item or service without modifying the master rental agreement.

50. The server system of Claim 49 wherein the rental is for a vehicle.

51. The server system of Claim 50 wherein the vehicle is a land-based vehicle.

52. The server system of Claim 51 wherein the land-based vehicle is a car.

53. A method for completing a rental agreement with a server system using a client system, said method comprising the steps of:

entering first information pertaining to a reservation of an item or service, and second information pertaining to a rental of said item or service, said entering step entering: (a) said second information without employing a master rental agreement, or (b) at least some of said second information from a master rental agreement and allowing modification of said second information from the master rental agreement for rental of said item or service without modifying the master rental agreement;

sending said first and second information to the server system;

receiving from said server system a rental proposal responsive to said sent first and second information;

displaying said rental proposal;

accepting said rental proposal; and

sending said acceptance to the server system, in order to complete the rental agreement online.

54. A method for completing a rental agreement with a client system using a server system, said method comprising the steps of:

storing information for a plurality of items or services;

receiving from the client system first information pertaining to a reservation of an item or service, and second information pertaining to a rental of said item or service;

retrieving the stored information for said items or services;

providing a reservation based at least in part upon said first information and the retrieved stored information;

generating a rental proposal based upon said reservation and said received second information, said generating step generating said rental proposal: (a) without employing a master rental agreement, or (b) employing at least some of said second information from a master rental agreement and allowing modification of said second information from the master rental agreement for rental of said item or service without modifying the master rental agreement;

sending the rental proposal to the client system; and

receiving an acceptance of the rental proposal from the client system, in order to complete the rental agreement online.

55. A system for completing a rental agreement, said system comprising:

a client sub-system comprising:

an entry component entering first information pertaining to a reservation of an item or service, and entering second information pertaining to a rental of said item or service, said entry component entering: (a) said second information without employing a master rental agreement, or (b) at least some of said second information from a master rental agreement and allowing modification of said second information from the master rental agreement for rental of said item or service without modifying the master rental agreement,

a processor component cooperating with said entry component,

a communication component, responsive to said processor component, sending said first and second information to a server sub-system, and

receiving from said server sub-system a rental proposal responsive to said sent first and second information, and

a display component displaying said rental proposal,

said entry component and said processor component cooperating to initiate acceptance of said rental proposal, and

said communication component, responsive to said acceptance, sending said acceptance to the server sub-system;

said server sub-system comprising:

a data storage component storing information for a plurality of items or services,

a communication component receiving said first and second information from the client sub-system,

a reservation component retrieving stored information from said data storage component for said items or services, and providing a reservation based at least in part upon said first information and the retrieved stored information,

a rental component generating a rental proposal based upon said reservation and said received second information, and

a processor component cooperating with said communication component, said reservation component and said rental component to provide the reservation, to send the rental proposal to the client sub-system and to receive an acceptance of the rental proposal from the client sub-system, in order to complete the rental agreement online; and

a communication sub-system communicating between the communication component of said client sub-system and the communication component of said server sub-system.

56. The system of Claim 55 wherein said communication sub-system is a global communication network.

57. The system of Claim 56 wherein the global communication network is the Internet.

58. The system of Claim 57 wherein said display component employs a web page for displaying said rental proposal.

59. The system of Claim 55 wherein said items are vehicles; and wherein said display component employs a web page for selecting one of said vehicles.

60. The system of Claim 55 wherein said communication sub-system includes a global communication network employing an ATM protocol.

61. The system of Claim 60 wherein said communication sub-system employs a frame relay protocol; and wherein said server sub-system includes a kiosk communicating with said frame relay protocol, said kiosk having at least one of a printer and a display for displaying the rental agreement.

62. The system of Claim 55 wherein said processor component is a web server; and wherein said data storage component is a database server.

63. The system of Claim 55 wherein said reservation component is a reservation system running on a mainframe and said rental component is a rental system running on said mainframe.

64. The system of Claim 55 wherein said server sub-system includes a web server for a web site; wherein said display component includes a browser for displaying portions of said web site; and wherein said entry component, said processor component and said communication component of said client sub-system cooperate to send said first information as reservation-related information to said web site, to send said second information as rental-related information to said web site, and to receive said rental proposal from said web site; and wherein said display component displays said received rental proposal.

65. The system of Claim 55 wherein said communication sub-system employs an ATM protocol; wherein said processor component of said server sub-system is a web server; wherein the communication component of said server sub-system includes an ATM switch and a firewall; and wherein said client sub-system communicates with said web server with said ATM protocol through said ATM switch and said firewall.

66. A method for completing a rental agreement online and obtaining an item or service for rental, said method comprising the steps of:

entering reservation-related information and rental-related information for said item or service, said entering step entering: (a) said rental-related information without employing a master rental agreement, or (b) at least some of said rental-related information from a master rental agreement and allowing modification of said information from the master rental agreement for rental of said item or service without modifying the master rental agreement;

providing a reservation for said item or service based at least in part upon said reservation-related information;

creating and displaying a rental proposal based upon said reservation and said rental-related information;

accepting said rental proposal online;

displaying the rental agreement based upon said accepted rental proposal; and

going to a rental counter before obtaining said item or service for rental.

67. The method of Claim 66 further comprising:

displaying said rental proposal at a client system; and

accepting said rental proposal at said client system to complete said rental agreement.

68. The method of Claim 66 further comprising:

renting a vehicle as said item or service.

69. The method of Claim 68 further comprising:

going to the rental counter to obtain an optional item before obtaining said vehicle for rental.

70. The method of Claim 69 further comprising:

obtaining a stroller at the rental counter as said optional item.

71. The method of Claim 66 further comprising:

providing expedited service at the rental counter based upon said rental agreement; and

allocating said vehicle at the rental counter.

72. The method of Claim 66 further comprising:

displaying the rental agreement at the rental counter.

73. The method of Claim 66 further comprising:

entering said reservation-related information and said rental-related information by employing at least one of a telephone, a global communication network, and electronic mail.

APPENDIX 2 (Evidence Appendix)

Webster's Third New International Dictionary, p. 43 (1993) (entered in the record by the Examiner with the non-final Amendment filed on March 5, 2004).

"Information on Hertz Corporation, 1997 - 2000" (Hertz), pp. 5, 34 (made of record by the Examiner with the Office Action mailed on March 5, 2004; *see* Office form PTO-892, Cite U, mailed on December 5, 2003).

Black, Black's Law Dictionary, West Publishing Company, p. 62 (1979) (made of record by the Examiner with the Final Office Action mailed on September 19, 2006).

ag·nus dei \ˌäg,nüs'dā,ā, -ˌnəs-, ˌän,yüs-, -yüs-; *sometimes, when not sung,* -'dā; ˌagnəs'dē,ī\ *n, usu cap A&D* [ME, fr. LL, lamb of God, trans. of Gk *Amnos tou Theou*] **1** : an image of a lamb, often with a halo and bearing a banner or a cross, symbolizing Jesus Christ **2** *Roman Catholicism* **a** : a small cloth-covered disk of wax stamped with the figure of a lamb, blessed by the pope, and carried or worn through devotion **b** : a prayer in the ordinary of the mass beginning with the words "Agnus Dei" **3** *Anglicanism* : a liturgical prayer or anthem beginning "O Lamb of God"


Agnus Dei 1

ago \ə'gō\ *also* **agone** \ə'gȯn *also* -än\ *adj (or adv)* [ME *ago, agon*, fr. past part. of *agon* to go away, pass by, fr. OE *āgān* to pass away, fr. *ā-* (perfective prefix) + *gān* to go — more at ABEAR, GO] : gone by : PAST ⟨two days~⟩ ⟨he lived here long ~⟩

agog \ə'gäg *also* -ȯg\ *adj* [MF *en gogues* merry, lively, lit., in mirth] : full of intense interest, ardent anticipation, or extreme excitement ⟨the abrupt announcement . . . left everybody . . . ~ —Bennett Cerf⟩ : EAGER ⟨always ~ for news —Virginia Woolf⟩ **syn** see EAGER

ago·ge \ə'gōjē, -ōgē, ˌägō'gā\ *n* -s [Gk *agōgē*, lit., act of carrying away, fr. *agein* to lead — more at AGENT] *Greek music* : rate of speed : TEMPO

agog·ic \ə'gäjik, -gōgik\ *adj* [G *agogisch*, fr. Gk *agōgē* + G *-isch* -ish] : of or relating to agoge or agogics esp. to variations in tempo within a piece or movement ⟨tempos and ~ indications of an operatic score⟩

agogic accent *n* : stress secured through relative prolongation of the tones to be emphasized — compare AGOGICS

agog·ics \-iks\ *n pl but usu sing in constr* [G *agogik*, fr. Gk *agōgē* + G *-ik* -ics] **1** : the musical theory that rhetorical emphasis involves not only dynamic stress but also the emphasis implied in the greater relative length of the tones to be emphasized — compare RUBATO **2** : the quantitative aspect of musical nuances involving all variations from the rigid basic meter (as of retard, pause, accelerando)

-a·gogue \ə,gäg *also* -ōg\ *also* **-a·gog** \"\ *n comb form* -s [F & NL; F *-agogue*, fr. LL *-agogus* promoting the expulsion of, fr. Gk *-agōgos*, fr. *agōgos* leading, drawing forth, fr. *agein* to lead; NL *-agogon*, neut. of *-agogos* promoting the expulsion of, fr. Gk *-agōgos* — more at AGENT] : substance that promotes the secretion or expulsion of ⟨cholagogue⟩ ⟨lymphagogue⟩

ago·ho *or* **ago·jo** \ə'gō,hō\ *n* -s [*agoho* fr. Tag *agohó*; *agojo* fr. PhilSp, fr. Tag *agohó*] : HORSETAIL TREE

agon \'ä,gän, ä'gōn, 'a,gän, 'ā,gän\ *n, pl* **agons** \-nz\ *also* **ago·nes** \ä'gō,nes, ə'gō(,)nēz\ [Gk *agōn*, lit., gathering, assembly, contest — more at AGONY] : a struggle or contest: as **a** : a contest in athletics, chariot or horse racing, music, or literature at a public festival in ancient Greece **b** : the dramatic conflict between the chief characters in a Greek play **c** : the struggle between protagonist and antagonist in a literary work ⟨the central ~ of the novel⟩

ag·o·nal \'agən°l\ *adj* [*agony* + *-al*] : of, relating to, or associated with agony, esp. the death agony or period of dying ⟨the ~ state⟩ ⟨~ leukocytosis⟩

ago·ni·a·da \ə,gōnē'ädə, -adə\ *or* **agoniada bark** *n* -s [Pg *agoniada*] : the bark of a tropical So. American shrub (*Plumieria lancifolia*) yielding plumieride

ago·ni·a·ti·tes \(')ā,gōnēə'tīd,(,)ēz, ə,g-\ *n, cap* [NL, fr. 2a- + *Goniatites*] : a genus of Devonian ammonoid mollusks (family Goniatitidae)

agon·ic \(')ā'gänik, ə'g-\ *adj* [Gk *agonos* without angle (fr. *a-* 2a- + *gonia* angle, corner) + E *-ic*] : not forming an angle

agonic line *n* : an imaginary line on the earth's surface connecting the north and south magnetic poles and passing through those points where there is no magnetic declination and where a freely suspended magnetic needle indicates true north — compare ACLINIC LINE, ISOGONIC LINE

agon·i·dae \ə'gänə,dē\ *n pl, cap* [NL, fr. *Agonus*, type genus + *-idae*] : a family of small slender fishes (order Scleroparei) having the body covered with overlapping striated often spiny plates

ag·o·nist \'agənəst\ *n* -s [LL *agonista*, fr. Gk *agōnistēs* combatant, fr. *agōnizesthai* to contend, fr. *agōn* gathering, assembly, contest — more at AGONY] **1** : one that is engaged in a struggle: as **a** : a leading character (as the protagonist) in a literary work ⟨the chief interest of the novel . . . is an analysis of the nature and moods . . . of the four ~s —Iris Barry⟩ **b** : one that is beset by intellectual or spiritual conflicts ⟨an ~, a self-tormentor who ran to meet suffering halfway —John Buchan⟩ **2** [back-formation fr. *antagonist* "a muscle"] : a muscle that on contracting is automatically checked and controlled by the opposing simultaneous contraction of another muscle — see ANTAGONIST 2a, compare SYNERGIST

ag·o·nis·tic \ˌagə'nistik\ *also* **ag·o·nis·ti·cal** \-təkəl\ *adj* [LL *agonisticus* of a contest, fr. Gk *agōnistikos* fit for combat, contentious, fr. *agōnistēs* + *-ikos* -ic, -ical] **1** : of or relating to the athletic contests of ancient Greece ⟨~ inscriptions⟩ **2** : seeking to overcome in discussion or debate : ARGUMENTATIVE ⟨a dialectical and ~ approach to knowledge⟩ **3** : striving for effect : STRAINED ⟨~ poses⟩ — **ag·o·nis·ti·cal·ly** \-tək(ə)lē\ *adv*

ag·o·nize \'agə,nīz, 'aig-\ *vb* -ED/-ING/-S *see -ize in Explan Notes* [MF *agoniser* to be in agony, fr. LL *agonizare*, fr. Gk *agōnizesthai*, fr. *agōnia* agony — more at AGONY] *vt* : to cause to suffer agony : TORTURE ⟨he *agonized* himself with the thought —Aldous Huxley⟩ ~ *vi* **1** : to suffer agony or torture : be in great pain or anguish ⟨who *agonized* and prayed and yet could not secure release from their guilt —Lillian Smith⟩ **2** : to try desperately : STRUGGLE ⟨strive to do and ~ to do and fail in doing —Robert Browning⟩ **syn** see WRITHE

agonized *adj* : characterized by, suffering, or expressing agony ⟨an ~ search⟩ ⟨an ~ father⟩ ⟨an ~ cry⟩ — **ag·o·niz·ed·ly** \-zədlē, -li\ *adv*

agonizing *adj* : causing agony : PAINFUL ⟨an ~ reappraisal of the role and the future of the French Empire —D.W.Brogan⟩ — **ag·o·niz·ing·ly** *adv*

ag·o·nos·to·mus \ˌagə'nästəməs\ *n, cap* [NL, fr. Gk *agōnos* without angle + NL *-stomus*] : a genus of tropical freshwater mullets of the East and West Indies and Mexico much used as food

agon·o·thete \ə'gänə,thēt\ *n, pl* **agonothetes** \-ēts\ *or* **ag·o·noth·e·tae** \ˌagə'näthə,tē, -,tī\ [LL *agonotheta*, fr. Gk *agōnothetēs*, fr. *agōn* + *-thetēs* (fr. *tithenai* to appoint, make, do) — more at DO] : the judge or director of public games in ancient Greece

ag·o·ny \'agənē, 'aig-, -ni\ *n* -ES [ME *agonie*, fr. MF & LL; MF *agonie*, fr. LL *agonia*, fr. Gk *agōnia* contest, struggle, anguish, fr. *agōn* gathering, assembly at games, contest for a prize, fr. *agein* to lead, celebrate — more at AGENT] **1 a** : intense pain of mind or spirit : extreme distress : ANGUISH ⟨the ~ of being found wanting and exposed to the disapproval of others —Margaret Mead⟩ **b** *often cap* : the sufferings of Jesus in the garden of Gethsemane ⟨and being in an ~ he prayed more earnestly —Lk 22:44 (AV)⟩ **2 a** : intense pain of body : extreme torment : TORTURE ⟨left arm twisted upward behind him . . . in slow, deliberate ~ —Kay Boyle⟩ **b** : the throes of death : death struggle ⟨his final ~⟩ **3** : a violent struggle, conflict, or contest ⟨the world is convulsed by the *agonies* of great nations —T.B.Macaulay⟩ **4** : a strong sudden and often uncontrollable display (as of joy or delight) : OUTBURST ⟨my cousin . . . in an ~ of mirth —Edith Wharton⟩ **syn** see DISTRESS

agony column *n* : a newspaper column of personal advertisements relating esp. to lost objects, missing relatives or friends, and marriage separations

agood [*a-* + *good* (adj.)] *obs* : in earnest : HEARTILY

ag·o·ra \'agərə\ *n, pl* **agoras** \-rəz\ *or* **ag·o·rae** \-,rē, -,rī\ [Gk, fr. *ageirein* to assemble — more at GREGARIOUS] : a gathering place or assembly; *esp* : the market place in ancient Greece

ag·o·ra·pho·bia \ˌagərə'fōbēə\ *n* -s [NL, fr. Gk *agora* + NL *-phobia*] : abnormal fear of crossing or of being in the midst of open spaces — contrasted with *claustrophobia* — **ag·o·ra·pho·bic** \ˌ···'fōbik *also* -äb-\ *adj*

agoua·ra *also* **agua·ra** \ˌagwə'rä\ *n* -s [Pg *aguara* & Sp *aguará*, fr. Guarani *aguará*] **1** : any of several So. American wild dogs (genus *Chrysocyon*) **2** : CRAB-EATING RACCOON

1agou·ti *also* **agou·ty** \ə'güd·ē, -ütē, -i\ *n, pl* **agoutis** *also* **agouties** [F *agouti*, fr. Sp *agutí*, fr. Guarani *acutí, agutí*] **1** : a rodent of the genera *Dasyprocta* and *Myoprocta* being about the size of a rabbit and brownish or grizzled in color and peculiar to So. and Central America and the West Indies **2 a** : a grizzled color of the fur or hair of many rodents (as wild guinea pigs, rats, mice, and squirrels) consisting of the barring of each hair in several alternate dark and light bands blackish blue or brown at the base and yellowish at the tip **b** : an agouti-coated animal

2agouti \"\ *adj* : characterized by or bearing the color agouti

ag·pa·ite \'agpə,īt\ *n* -s [*Agpa*, locality in southern Greenland + E *-ite*] : any of a group of feldspathoid rocks (as naujaites, lujauvrites, or kakortokites) from Ilimausak, Greenland, which differ from normal nephelite-syenites in having alumina in excess of the alkalies — **ag·pa·it·ic** \ˌ··'id·ik\ *adj*

agr *abbr* agriculture

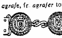
1agra \ə'grō\ *n* -s [IrGael *a grādh*, fr. *a* oh + *grādh* love, fr. MIr *grād*; akin to L *gratus* beloved, dear — more at GRACE] *Irish* : my dear : SWEETHEART

2agra \'ägrə\ *adj, usu cap* [fr. *Agra*, India] : of or from the city of Agra, India : of the kind or style prevalent in Agra

3agra \"\ *n* -s *usu cap* [fr. *Agra*, India, where it is made] : a carpet usu. distinguished by thick pile and heavy knotting

-ag·ra \'agrə, 'aig- *sometimes* 'äg-\ *n comb form, pl* **-ag·rae** \-,grē\ *also* **-agras** [ME, fr. L, fr. Gk, fr. *agra* hunting, catch; akin to W *aer* war, L *agere* to drive — more at AGENT] : seizure of pain ⟨cardiagra⟩ ⟨melagra⟩

agrafe *or* **agraffe** \ə'graf\ *n* -s [F *agrafe*, fr. *agrafer* to hook, fasten, fr. MF, fr. *a-* (fr. L *ad-*) + *grafer* to hook, fr. *grafe* hook, fr. OHG *kräpfo*; akin to OHG *krampfo* hook — more at CRAMP] **1** : a hook-and-loop fastening; *esp* : an ornamental clasp used on armor or costumes ⟨an ~ set with pearls⟩ **2** : a hook, eyelet, or other device by which a piano wire is so held as to prevent the section between the pin and the bridge from vibrating **3 a** : a cramp used in building to hold stones together **b** : relief sculpture put upon the head of an arch **4** : the iron clamp used to secure the cork in a champagne bottle or the closure in any jug, bottle, or carboy


agrafe 1

agra gauze \'ägrə-\ *n, usu cap A* [fr. *Agra*, India, where it was made] : a silk gauze with stiff finish used for trimming

agram·ma·tism \(')ā'gramə,tizəm\ *n* -s [ISV *agrammat-* (fr. Gk *agrammatos* illiterate, fr. *a-* 2a- + *grammat-*, *gramma* letter) + *-ism*; orig. formed as G *agrammatismus* — more at GRAMMAR] : the pathologic inability to use words in grammatical sequence

agran·u·lo·cyte \(')ā'granyəlō,sīt\ *n* -s [ISV 2a- + *granulocyte*] : a leukocyte without cytoplasmic granules : a lymphocyte or monocyte — compare GRANULOCYTE

agran·u·lo·cyt·ic angina \ˌ·,····'sid·ik\ *n* : GRANULOCYTOPENIA

agranulocytosis \ˌ·,···,sī'tōsəs\ *n, pl* **agranulocyto·ses** \-ō,sēz\ [NL, fr. 2a- + E *granulocyte* + NL *-osis*] **1** : GRANULOCYTOPENIA **2** *Brit* : PANLEUCOPENIA

ag·ra·pha \'agrəfə\ *n pl* [Gk, neut. pl. of *agraphos* unwritten, fr. *a-* 2a- + *-graphos* (fr. *graphein* to write) — more at CARVE] : sayings of Jesus unrecorded in the canonical gospels but found in other parts of the New Testament or in early Christian writings

agraph·ia \(')ā'grafēə\ *n* -s [NL, fr. 2a- + *-graphia* -graphy] : the pathologic loss of the ability to write — **agraph·ic** \(')ā'grafik\ *adj*

1agrar·i·an \ə'grerēən, -ra(a)r-, -rār-\ *adj* [L *agrarius* (fr. *agr-*, *ager* field + *-arius* -ary) + E *-an* — more at ACRE] **1** : of or relating to the land or landed property ⟨a policy of ~ redistribution was sketched out —G.A.Craig⟩ **2 a** : of, by, or characteristic of the farmer or his way of life ⟨the application of ~ virtues to . . . industrial economy —Lloyd Morris⟩ **b** : organized or designed to promote agricultural interests ⟨an ~ party drawing its original impulse from the grain growers and dairymen —H.R.Penniman⟩ **3** : growing wild in fields : CAMPESTRAL — **agrarianly** *adv*

2agrarian \"\ *n* -s *often cap* : one who favors agrarianism; *esp* : a member of an agrarian party or movement

agrar·i·an·ism \-,nizəm\ *n* -s **1 a** : the doctrine of an equal division or equitable redistribution of landed property **b** : a social or political movement designed to bring about land reforms or to improve the economic status of the farmer **2** : the way of life associated with a farm economy and country towns in contrast to that associated with an industrial economy

agré·a·tion \ägrāäsyōⁿ\ *n* -s [F, lit., approval, fr. *agréer* to agree + *-ation*] : a diplomatic procedure by which a state determines in advance whether a proposed envoy will be acceptable to the receiving state — compare AGRÉMENT

agree \ə'grē\ *vb* **agreed; agreed; agreeing; agrees** [ME *agreen*, fr. MF *agreer*, fr. *a-* (fr. L *ad-*) + *gré* will, pleasure, fr. L *gratum*, neut. of *gratus* beloved, dear, agreeable — more at GRACE] *vt* **1 a** : to concur in (as an opinion) : ADMIT ⟨all *agreed* that he was a man of stature⟩ **b** : to indicate willingness : CONSENT ⟨~ to abide by the interpretation of the court —M.R.Cohen⟩ **2** *chiefly Brit* **a** : to settle upon by arrangement : ARRANGE ⟨the following articles were *agreed* —Sir Winston Churchill⟩ **b** : to bring into settlement ⟨they have *agreed* their quarrel⟩ ~ *vi* **1** : to give assent : express approval : ACCEDE — usu. used with *to* or *with* and sometimes with *in* ⟨~ to a plan⟩ ⟨~ with an opinion⟩ ⟨I ~ . . . in . . . what you say —Benjamin Jowett⟩ **2 a** : to achieve harmony (as of opinion, feeling, or purpose) : become of one mind ⟨no two of his admirers would . . . ~ in their selection of characteristic passages —Bliss Perry⟩ ⟨~ with classical antiquity in deeming a figure of speech to be worth frequent use —C.E. Montague⟩ **b** : to live or act together harmoniously : get along together ⟨the two managed to ~ fairly well and the next month passed very pleasantly —Elinor Wylie⟩ **c** : to reach a harmonious understanding : come to terms — usu. used with *on* or *upon* ⟨~ on a fair division of the profits⟩ ⟨the means of settling the dispute were finally *agreed* upon⟩ **3 a** : to be similar : CORRESPOND — used with *with* ⟨the photographs ~ exactly with the originals⟩ **b** : to resemble one another : correspond to each other ⟨the accounts of the wreck did not ~⟩ **c** : to be consistent or consonant : HARMONIZE — used with *with* ⟨popular poetry . . . *agreed* with the favorite fiction . . . in attitude —J.D.Hart⟩ **4 a** *obs* : to react suitably, pleasingly, or healthfully — used with *with* ⟨your appetites and your digestions do not ~ with it —Shak.⟩ **b** : to be fitting, pleasing, or healthful : SUIT — used with *with* ⟨a dry climate will ~ with the patient⟩ ⟨onions don't ~ with everyone⟩ **5** : to have an inflectional form denoting either identity or some regular correspondence other than identity in such grammatical categories as gender, number, case, or person ⟨the German verb ~s with its subject in person and number⟩ ⟨the Latin adjective ~s with its noun in gender, number, and case⟩ ⟨in classical Greek a verb in the third person singular ~s with a neuter plural subject⟩

syn CONCUR, COINCIDE: AGREE suggests an accord, harmony, or compatibility arrived at by a settling of differences, as in the making of a truce, or by acquiescence where there was or might have been opposition or contention ⟨*agree* upon a price⟩ ⟨I will presume that Mr. Murry and myself can *agree* that for our purposes these counters are adequate —T.S.Eliot⟩ CONCUR suggests a thinking, acting, or functioning cooperatively or harmoniously toward a given end or for a given purpose ⟨for the creation of a masterwork of literature two powers must *concur*, the power of the man and the power of the moment —Matthew Arnold⟩ ⟨all those who have been concerned in the administration of our finances have *concurred* in representing its importance or necessity —John Marshall⟩ COINCIDE emphasizes the identity or precise accord of nature, function, opinion, or attitude in much the same way that, applied to historical events, it signifies their occurrence at precisely the same time or place. It is infrequently used of persons ⟨private groups whose interests did not *coincide* with national defense —T.W.Arnold⟩ ⟨the hearty tones natural when the words demanded by politeness *coincide* with those of deep feeling —Thomas Hardy⟩

syn TALLY, SQUARE, CONFORM, CORRESPOND, HARMONIZE, ACCORD, JIBE: AGREE is a general term indicating a going, fitting, or matching together without significant difference, contradiction, or conflict ⟨in general, the two accounts *agree*⟩ ⟨their findings *agree* with his⟩ TALLY suggests an agreement like that between two correct sets of accounts or records matching in both itemized details and overall conclusions ⟨one thing must match another or representation must *tally* with thing represented, like items in a tradesman's account —R.M. Weaver⟩ SQUARE suggests an exact agreeing, as if one item could perfectly fit with the form or shape of another ⟨these two assertions *square* with orthodox tradition —T.S.Omond⟩ ⟨the facts of history exist, but they hardly trouble us. We select and interpret our documents till they *square* with our theories —Aldous Huxley⟩ CONFORM suggests an essential agreement in form or in action, nature, or import making differences or deviations unimportant ⟨a widely diffused popular story of a fairy wife or husband which *conforms* to the type known as the Swan Maiden, or Beauty and the Beast, or Cupid and Psyche —J.G.Frazer⟩ ⟨and since theology was philosophy's queen, medieval philosophy *conformed* to that system which Augustine employed in his theology —H.O.Taylor⟩ CORRESPOND may be used to indicate the matching of far-apart or dissimilar things in falling into the same category or in being analogous, as well as to apply to closely similar items ⟨remind ourselves that ideas and images and thoughts are merely the objects that *correspond* to certain impulses and conations of our own —Samuel Alexander⟩ ⟨conjurers, who *correspond* to the Siberian shamans, affect the usual mystery of the priestly craft —Edward Clodd⟩ HARMONIZE suggests a matching, juxtaposing, or combining agreeably or pleasurably without jarring or grating ⟨the advantage of the Ptolemaic scheme, complicated though it was, was that it *harmonized* fairly well with the observable phenomena of the heavens —G.C.Sellery⟩ ⟨such mortal impulses were so very difficult to *harmonize* with the eternal beatitude which consisted in the cognition and love of God —H.O.Taylor⟩ ACCORD suggests a general compatibility, a capacity for fitting, matching, or accompanying without friction, discord, difficulty ⟨the common doctrine of liberty *accorded* with the passions released by the Revolution —V.L. Parrington⟩ ⟨the splendid moving ritual, with a Queen who so perfectly *accorded* with its spirit, lifted the people of Britain out of their normal selves —*Britain Today*⟩ JIBE is more colloquial than the preceding; it suggests matching, fitting, or accord without serious difficulty or contradiction ⟨that the attempts at "reconciliation" were futile, that common sense and science simply wouldn't *jibe*, was not Mill's fault —Gail Kennedy⟩ **syn** see in addition ASSENT

agree·a·bil·i·ty \ə,grēə'bilad·ē, -ətē, -i\ *n* -ES : the quality or state of being agreeable

1agree·a·ble \ə'grēəbəl\ *adj* [ME *agreable*, fr. MF, fr. *agreer* + *-able*] **1 a** : pleasing to the mind or senses : to one's liking : PLEASANT ⟨an ~ manner⟩ ⟨an ~ garden⟩ ⟨~ people⟩ ⟨an occupation ~ to his tastes⟩ **b** *of an odor* : FRAGRANT **2** : ready or willing to agree or consent : favorably disposed ⟨~ to the plan⟩ **3** : in harmony or keeping : CONSISTENT, CONSONANT ⟨the theory . . . was ~ to the general evolutionary conceptions of the period —S.F.Mason⟩ **syn** see PLEASANT

2agreeable \"\ *n* -s : an agreeable person or thing — usu. used in pl. ⟨superficial advantages and outside ~s —S.T.Coleridge⟩

agree·a·ble·ness *n* -ES : AGREEABILITY

agreeable to *prep* : in accordance with the requirements of : as provided by : according to ⟨chose officers *agreeable to* the laws of that province —*Amer. Guide Series: Vt.*⟩

agree·a·bly \-blē, -li\ *adv* [ME *agreablely, agreably*, fr. *agreable* + *-ly*] **1** : in an agreeable manner : PLEASANTLY **2** *obs* : in the same way : SIMILARLY

agreeably to *prep* : in conformity with : as provided by : according to ⟨disobedience of orders in not attacking the enemy . . . *agreeably to* repeated instructions —H.E.Scudder⟩

agreed *past of* AGREE

agreed case *n* : CASE STATED

agreed rate *n* : an esp. low rate granted by a carrier to a shipper in return for the allocation of a high proportion of the shipper's freight to that carrier

agreed valuation *n* : the value of articles or shipments agreed upon by shipper and carrier in order to obtain a specific rating or limited liability — compare RELEASED VALUATION

agreed weight *n* : the weight per package or unit agreed upon by shipper and carrier to avoid weighing each package or unit

agreeing *pres part of* AGREE

agreeingly *adv* : in an agreeing manner

agree·ment \ə'grēmənt\ *n* -s [ME *agrement*, fr. MF, fr. *agreer* to please, agree + *-ment* — more at AGREE] **1 a** : the act of agreeing or coming to a mutual arrangement ⟨never any solemn ~ amongst themselves —John Locke⟩ **b** : oneness of opinion, feeling, or purpose : harmonious understanding : CONCORD ⟨with which religious tradition . . . must come to some sort of ~ —W.R.Inge⟩ **c** : the state of agreeing or being in accord : HARMONY, CORRESPONDENCE ⟨~ between the measured ionospheric data and the indications of practical communication experience —*London Calling*⟩ **2 a** : an arrangement (as between two or more parties) as to a course of action ⟨entered into an ~ . . . to assist in planting a colony —R.J.Stanley⟩ **b** : a compact entered into by two or more nations or heads of nations : COVENANT, TREATY **3 a** : a contract duly executed and legally binding on the parties entering into it — see CONTRACT, MEETING OF THE MINDS **b** : the written or oral phraseology embodying reciprocal promises **c** : the written instrument that is the evidence of an agreement **4** : the fact of agreeing grammatically ⟨the ~ of the English personal pronoun with its antecedent in gender and number⟩

agrees *pres 3d sing of* AGREE

agré·ga·tion \ägrāgäsyōⁿ\ *n, pl* **agrégations** \"\ *n* -s [F, lit., admittance, fr. ML *aggregation-, aggregatio* act of collecting, fr. L *aggregatus* (past part. of *aggregare*) + *-ion-, -io* -ion] : a competitive examination given at French universities which must be passed for admission to the rank of agrégé

agré·gé \ägrāzhā, -rezhā\ *n, pl* **agrégés** \"\ [F, fr. past part. of *agréger* to admit (influenced in meaning by *agrégation*), fr. L *aggregare* to add to — more at AGGREGATE] : an academic rank conferred by a French university on one who has passed a rigidly competitive examination and who is therefore entitled to appointment to the highest teaching post in a lycée or in one of the faculties of a university

agré·mens \ägrämäⁿ\ *or* **agré·ments** *n pl* [F *agréments* (formerly also spelled *agrémens*), pl. of *agrément* pleasure, ornament, agreement, approval — more at AGREEMENT] : AMENITIES ⟨the ~ of social life⟩

agré·ment \ägrāmäⁿ\ *n, pl* **agréments** \"\ [F] **1** : GRACE NOTE, ORNAMENT **2** : the approval of a diplomatic representative by the state to which he is to be accredited — compare AGRÉATION

agres·tal \ə'grest°l\ *or* **agres·tial** \-es(h)chəl\ *adj* [L *agrestis* (fr. *agr-*, *ager* field) + E *-al*] : dwelling or growing wild in the fields : WILD

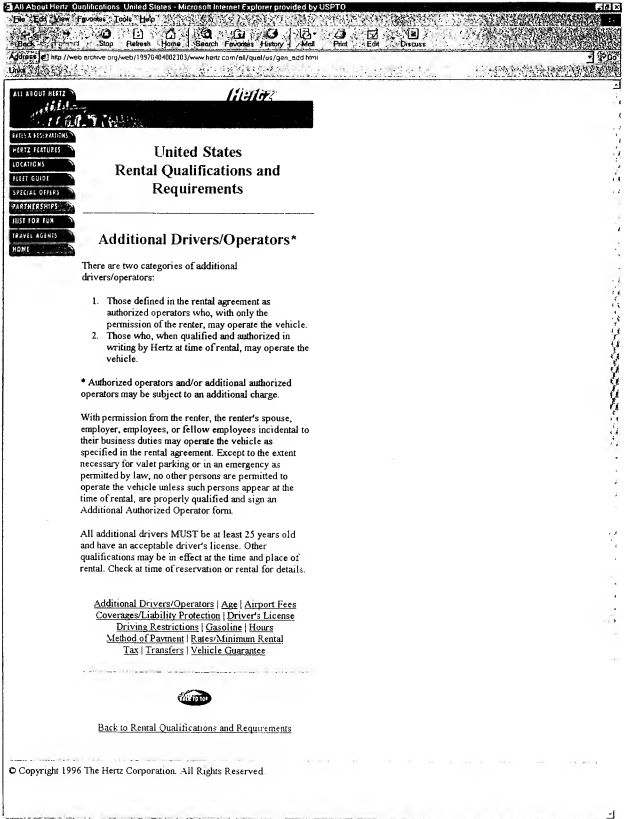
agres·tic \-stik\ *adj* [L *agrestis* + E *-ic*] : of or relating to the fields or country : RUSTIC

ag·ri·business \'agrə, 'aigrə+,·\ *n* [blend of *agriculture* and *business*] : a combination of the producing operations of a farm, the manufacture and distribution of farm equipment and supplies, and the processing, storage, and distribution of farm commodities

ag·ri·cere \'agrə,si(ə)r\ *n* -s [L *agri* (gen. of *ager* field) + *-cere* (fr. *cera* wax) — more at ACRE, CERE] : a waxy or resinous coating of organic matter on soil particles

agric·o·lite \ə'grikə,līt\ *n* -s [G *agricolit*, fr. Georgius *Agricola* (Georg Bauer) †1555 Ger. mineralogist + G *-it* -ite] : monoclinic bismuth silicate : EULYTITE

ag·ri·cul·tur·al \ˌagrə'kəlch(ə)rəl, ˌaig-\ *adj* **1 a** : of, relating to, or used in agriculture ⟨~ production⟩ ⟨~ equipment⟩ **b** : characterized by or engaged in farming as the chief occupation ⟨an ~ community⟩ **c** : founded or designed to promote the interest or study of agriculture ⟨an ~ college⟩ ⟨an ~ magazine⟩ **2** : of or having the characteristics of the farmer or his way of life ⟨the ~ life⟩ — **ag·ri·cul·tur·al·ly** \-rəlē, -li\ *adv*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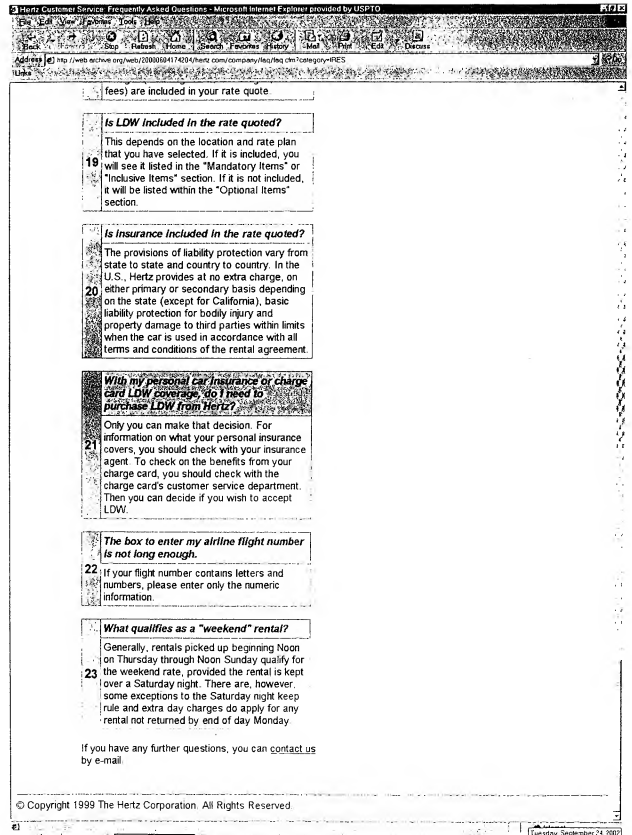
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BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors, Bankruptcy, Mortgages, Constitutional Law, Interpretation of Laws, Rescission and Cancellation of Contracts, Etc.

FIFTH EDITION

BY

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Agree. To concur; come into harmony; give mutual assent; unite in mental action; exchange promises; make an agreement; arrange; to settle. Concur or acquiesce in; approve or adopt. *Agreed* or *agreed to*, are frequently used (like *accord*), to show the concurrence or harmony of cases; e.g. *Agreed per curiam.* Usually implies some contractual undertaking. To grant or covenant, as when a grantor agrees that no building shall be erected on an adjoining lot; or a mortgagor agrees to cause all taxes to be paid. See **Agreement; Contract.**

Agreed. Settled or established by agreement. Commonly synonymous with "contracted."

Agreed amount clause. Provision in insurance policy that the insured will carry a stated amount of insurance coverage.

Agreed case. See *Case agreed on* under **Case.**

Agreed judgment. See **Judgment.**

Agreed price. The consideration for sale of goods arrived at by mutual agreement as contrasted with "open price". U.C.C. § 2–305.

Agreed statement of facts. A statement of facts, agreed on by the parties as true and correct, to be submitted to a court for a ruling on the law of the case. United States Trust Co. v. New Mexico, 183 U.S. 535, 22 S.Ct. 172, 46 L.Ed. 315. See *Case agreed on* under **Case.** See also **Stipulation.**

Agreed statement on appeal. Narrative statement of facts in case which may be filed on appeal in lieu of report of proceedings below. It is required that all parties agree to content of narrative.

Agreed value. The worth or value of property upon which persons agree beforehand as in a partnership contract in which the parties agree on the value of a partner's interest in a specified amount. Walraven v. Ramsay, 335 Mich. 331, 55 N.W.2d 853, 856.

Agreement. A coming together of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition. In law, a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances. The consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation.

The act of two or more persons, who unite in expressing a mutual and common purpose, with the view of altering their rights and obligations. The union of two or more minds in a thing done or to be done; a mutual assent to do a thing. A compact between parties who are thereby subjected to the obligation or to whom the contemplated right is thereby secured.

Although often used as synonymous with "contract", agreement is a broader term; e.g. an agreement might lack an essential element of a contract. The bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. U.C.C. § 1–201(c); Uniform Consumer Credit Code, § 1.301(3).

The writing or instrument which is evidence of an agreement.

See also Binding agreement; Compact; Consent; Contract; Covenant; International agreements; Meeting of minds.

Classification

Conditional agreements. The operation and effect of such depend upon the existence of a supposed state of facts, or the performance of a condition, or the happening of a contingency.

Executed agreements. Such have reference to past events, or which are at once closed and where nothing further remains to be done by the parties.

Executory agreements. Such agreements as are to be performed in the future. They are commonly preliminary to other more formal or important contracts or deeds, and are usually evidenced by memoranda, parol promises, etc.

Express agreements. Those in which the terms and stipulations are specifically declared and avowed by the parties at the time of making the agreement.

Implied agreement. (1) Implied in fact. One inferred from the acts or conduct of the parties, instead of being expressed by them in written or spoken words. Baltimore Mail S. S. Co. v. U. S., C.C.A.Md., 76 F.2d 582, 585. (2) Implied in law; more aptly termed a constructive or quasi contract. One where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress. Baltimore Mail S. S. Co. v. U. S., C.C.A.Md., 76 F.2d 582, 585. One inferred by the law where the conduct of the parties with reference to the subject-matter is such as to induce the belief that they intended to do that which their acts indicate they have done. Baltimore & O. R. Co. v. U. S., 261 U.S. 592, 43 S.Ct. 425, 67 L.Ed. 816.

Parol agreements. At common law, such as are either by word of mouth or are committed to writing, but are not under seal. The common law draws only one great line, between things under seal and not under seal.

Agreement for insurance. An agreement often made in short terms preliminary to the filling out and delivery of a policy with specific stipulations. See also **Binder.**

Agreement not to be performed within a year. An agreement that necessarily must require more than year for performance. Incapable of performance within one year. Street v. Maddux, Marshall, Moss & Mallory, 58 App.D.C. 42, 24 F.2d 617, 619.

Agreement of sale; agreement to sell. An agreement of sale may imply not merely an obligation to sell, but an obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. Treat v. White, 181 U.S. 264, 21 S.Ct. 611, 45 L.Ed. 853. It is a contract to be performed in future, and, if fulfilled, results in a sale; it is preliminary to sale and is not the sale.

APPENDIX 3 (Related Proceedings Appendix)

None.

APPENDIX 4 (Other Authorities Appendix)

Copies are attached as suggested by 37 CFR § 41.12(b):

Ault v. Pakulski, 520 A.2d 703 (Me. 1987);

Bishop v. Hendrickson, 695 P.2d 1313 (Mont. 1985);

North Coast Cookies, Inc. v. Sweet Temptations, Inc., 16 Ohio App. 3d 342, 476 N.E.2d 388 (1984);

Arrowhead Constr. Co. v. Essex Corp., 233 Kan. 241, 662 P.2d 1195 (1983);

Almeida v. Almeida, 4 Haw. App. 513, 669 P.2d 174 (1983);

Porter v. Porter, 637 S.W.2d 396 (Mo. App. 1982);

Belitz v. Riebe, 495 So. 2d 775 (Fla. App. 1986);

Gregory v. Perdue, Inc., 47 N.C. App. 655, 267 S.E.2d 584 (1980);

Burgess v. Rodom, 121 Cal. App. 2d 71, 262 P.2d 335 (1953);

Machesky v. City of Milwaukee, 214 Wis. 411, 253 N.W. 169 (1934);

Sun Printing & Pub'g Ass'n v. Remington Paper & Power Co., 235 N.Y. 338, 139 N.E. 470 (1923); and

Palmer v. Aeolian Co., 46 F.2d 746, 753 (8th Cir. 1931).

Supreme Judicial Court of Maine.
Ruth AULT, formerly Ruth Pakulski
v.
John PAKULSKI.

Argued Nov. 3, 1986.
Decided Jan. 27, 1987.

Former husband appealed order of the Superior Court, Kennebec County, that he reimburse former wife for that part of her outlay for their children's education that court held to be his legal obligation under parties' agreement. The Supreme Judicial Court, McKusick, C.J., held that agreement made by husband and wife "to establish a trust for the education of the children" within one year after their divorce was not definite or complete enough for court to enforce against either as a legal obligation, where agreement did not specify how future educational trust was to be funded, implemented or administered.

Affirmed as modified.

Glassman, J., dissented and filed opinion in which Roberts, J., joined.

West Headnotes

Husband and Wife ⇐ 278(1)
205k278(1) Most Cited Cases
Provision in property settlement agreement made by husband and wife "to establish a trust for the education of the children" within one year after their divorce was not definite or complete enough for court to enforce against either as a legal obligation, where agreement did not specify how future educational trust was to be funded, implemented or administered.

***703** Lipman & Parks, William R. Stokes (orally), Robert J. Stolt, Augusta, for plaintiff.

Verrill & Dana, Charles Cragin, Richard N. Bryant (orally), Portland, for defendant.

Before McKUSICK, C.J., and NICHOLS, ROBERTS, WATHEN, GLASSMAN and CLIFFORD, JJ.

McKUSICK, Chief Justice.

This appeal presents a single and narrow question of contract law. We must decide whether a 1974 agreement made by defendant John Pakulski and plaintiff Ruth Ault, then husband and wife, "to establish a trust for the education of the children" within one year after their divorce is definite and complete enough for a court to enforce against either as a legal obligation. Answering the question in the negative, we set aside the Superior Court's order that Pakulski reimburse Ault for $14,700 that she paid toward the children's education over the intervening nine years.

On November 21, 1974, while a divorce action was pending between them, Ault and Pakulski executed a property settlement ***704** contract. Their divorce action went to judgment in the District Court (Waterville) on January 22, 1975. Nearly nine years later, in November 1983, Ault commenced in the Superior Court (Kennebec County) the present action seeking to enforce against Pakulski two provisions of that 1974 settlement contract: (1) Pakulski's agreement to maintain two specifically identified insurance policies and to keep Ault as beneficiary thereon until she should remarry or die; and (2) a paragraph 5 reading in full as follows:

> The Husband and Wife agree to establish a trust for the education of the children. This trust is to be executed within one year from the date of the divorce judgment, and the cost is to be borne on a percentage basis based on the respective incomes of the Husband and Wife.

On his appeal Pakulski does not attack the Superior Court's order of specific performance of his agreement to maintain the two identified insurance policies with Ault as their beneficiary. Rather, his sole challenge is to the Superior Court's order that he pay $14,700 to Ault to reimburse her for that part of her outlay for their children's education that the court held to be Pakulski's legal obligation under paragraph 5. [FN1]

> FN1. Pakulski challenges the enforceability of paragraph 5 solely for lack of definiteness and completeness. He makes no argument that the settlement agreement, which recited that it was "subject to the approval of the court," was unenforceable in absence of that approval. Nor does he argue that the settlement agreement was

merged into the divorce judgment by partial incorporation of its terms. *See* H. Clark, *The Law of Domestic Relations in the United States* 562-64 (1968). *Cf. Eatman v. Eatman,* 549 P.2d 389, 391 (Okla.Ct.App.1976) (where settlement agreement made no provision for court approval, incorporation into decree of some terms of the agreement left other terms to be enforced by separate action).

At the time of their settlement contract in 1974, two of the couple's four children were over 18 and the other two were 13 and 15 years of age. After the parties signed the settlement contract, they never created any trust fund or at any time discussed the establishment of a trust. Independently from time to time over the years each parent contributed in some part to the schooling of their children. Ault's contributions amounted to at least $20,000, Pakulski's to only $6,470. The children attended Gould Academy in Bethel, University of Maine at Farmington, John Cabot School in Italy, and Kenyon College in Ohio. The Superior Court found that "at times when the salaries of both could be computed," Pakulski, an airline pilot, earned a salary of about four times that of Ault, a school teacher. On that basis the Superior Court assigned to Pakulski legal responsibility for about 80% of the aggregate expenditures by both parents towards their children's education. We vacate that part of the Superior Court's judgment because paragraph 5 of the parties' 1974 settlement contract is so vague and incomplete as to be incapable of judicial enforcement.

Long ago we stated the principle that here controls:

> There is no more settled rule of law applicable to actions based on contracts than that an agreement, in order to be binding, must be sufficiently definite to enable the [c]ourt to determine its exact meaning and fix exactly the legal liability of the parties.

Corthell v. Summit Thread Co., 132 Me. 94, 99, 167 A. 79, 81 (1933). *See also Restatement (Second) of Contracts* § 33(2) (1981). A leading treatise writer has declared epigrammatically: "A court cannot enforce a contract unless it can determine what it is." 1 A. Corbin, *Contracts* § 95, at 394 (1963). Paragraph 5 falls short of that standard.

Paragraph 5 did not specify how the future educational trust was to be funded, implemented, or administered. Whether the parties would fund the trust by each making a single lump sum contribution or by making contributions over a period of time remained to be resolved, as did also the amount of that funding. Whether the parties would share responsibility for managing the trust, or allocate that responsibility ***705** to one or the other of them, or appoint an independent trustee was yet to be decided. Whether the term "education" was to encompass college for all or some of the children or only secondary school for the two minors was left to be decided, as was the question whether the children would attend public or more expensive private institutions. Whether the term "children" was to embrace the couple's two children who had already reached 18 or only their minor children was left unspecified.

Paragraph 5 stands in sharp contrast to every other provision of the 1974 settlement contract. All of the other paragraphs, including the insurance provision, stated in precise and complete terms the respective legal obligations of the parties commencing promptly upon the divorce. Paragraph 5 merely expressed a generalized, ill-formed desire purportedly held by both Ault and Pakulski in November 1974 to make in the future some provision for jointly paying in some amount for some education for some or all of their four children. It was nothing more than an "agreement to agree." At most, it was an agreement to confer within a year to negotiate the terms of an arrangement for sharing their children's educational expenses. The Superior Court could order specific performance of paragraph 5 only by supplying, on its own, critical contractual terms as to which the parties never had a meeting of the minds. The judgment here on review violates "the fundamental policy that contracts should be made by the parties, not by the courts, and hence that remedies for breach of contract must have a basis in the agreement of the parties." *Restatement (Second) of Contracts* § 33 comment b (1981).

Whatever moral obligation the parents of the Pakulski children may have had for their education, their agreement in the 1974 property settlement contract to establish in the future a joint trust for that purpose is too indefinite and incomplete to constitute a legal obligation enforceable by one parent against the other.

The entry is:

Vacate the order of the Superior Court granting plaintiff specific performance of paragraph 5 of the settlement contract and requiring defendant to pay $14,700 to plaintiff. As modified, the judgment of the Superior Court is affirmed.

NICHOLS, WATHEN and CLIFFORD, JJ., concurring.

GLASSMAN, Justice, with whom ROBERTS, Justice, joins, dissenting.

I respectfully dissent. The court ignores the general rule that courts will seek to construe contracts to give them meaning rather than to render them unenforceable. *Towne v. Larson,* 142 Me. 301, 305, 51 A.2d 51, 53 (1947). Furthermore, the court has examined the contract language without availing itself of evidence of how the parties themselves understood their obligations under the contract. Faced with the parties' indifference to the contract's uncertainties, interpretation requires greater reliance on their course of performance. *Blue Rock Industries v. Raymond International, Inc.,* 325 A.2d 66, 73 (Me.1974); 3 *Corbin on Contracts* § 558 (1960). Interpretation indicated by acts of the parties is entitled to great weight. *Bar Harbor and Union River Power Co. v. The Foundation Co.,* 129 Me. 81, 86, 149 A. 801, 803 (1930); *Lewiston and Auburn R.R. Co. v. Grand Trunk Ry. Co.,* 97 Me. 261, 267, 54 A. 750, 752 (1903). Application of these principles allows enforcement of the contract to the limited extent requested by the plaintiff in this case.

Consideration of the terms that the court holds too vague for enforcement reveals that none defy reasonable interpretation. Questions concerning funding and management of the trust are not pertinent because plaintiff does not seek to establish a trust. The meaning of the term "education"--whether it encompasses college or only secondary schools and whether private or public schools were contemplated--can be ascertained from common rules of construction and from the acts of the parties. ***706** If a contract leaves open a key term, the law invokes the standard of reasonableness, and courts will supply the needed term. *Corthell v. Summit Thread Company,* 132 Me. 94, 99, 167 A. 79, 81 (1933). The Superior Court specifically found that the expenditures for which plaintiff sought reimbursement were "reasonable and appropriate to promote the education of their children." Furthermore, the defendant made no specific objections at the time to any expenditure as unreasonable. He contributed directly to his oldest daughter's tuition at a private college in Italy, thus it is unlikely that he understood his obligations to be limited to public or secondary schools only. Finally, the term "children" can, in this context, only be understood to mean the offspring of the parties resulting from the marriage.

Courts should not deny relief on a contract because of vagueness if the parties' intent can be ascertained. *See Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E.2d 113, 117 (1962) (promise to buy wife "a new automobile" enforced). Here the Superior Court found that the clear intent of the parties was to provide for the education of their children and to apportion the costs according to the respective incomes of the parties. Faced with the limited dispute raised by the plaintiff's unreimbursed expenditures, the trial court had little difficulty effectuating that purpose. I would affirm.

520 A.2d 703

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Supreme Court of Montana.
Alfred L. BISHOP, Plaintiff and Appellant,
v.
Robert E. HENDRICKSON, Defendant and Respondent.
No. 84-445.

Submitted on Briefs Jan. 10, 1985.
Decided March 7, 1985.

Law partner brought action to enforce alleged oral contract to hire partners' children as lawyers. The District Court, Thirteenth Judicial District, Yellowstone County, Nat Allen, J., entered summary judgment for defendant, and plaintiff appealed. The Supreme Court, Hunt, J., held that alleged oral contract between partners that in event any of their children ever became lawyers and wanted to practice with firm that there would be "a place" for such child or children in the law firm failed to satisfy requirement of certainty necessary to form contract.

Affirmed.

West Headnotes

[1] Contracts ⇐ 9(1)
95k9(1) Most Cited Cases
Terms of contract must be reasonably certain.

[2] Attorney and Client ⇐ 30
45k30 Most Cited Cases
Alleged oral contract between law partners that in event any of their children ever became lawyers and wanted to practice with firm that there would be "a place" for such child or children in the law firm failed to satisfy requirement of certainty necessary to form contract. MCA 28-2-901.

[3] Frauds, Statute Of ⇐ 139(1)
185k139(1) Most Cited Cases
(Formerly 45k30)
Hiring of one law partner's daughter as a law clerk did not complete alleged oral contract to hire both partners' children as lawyers, so as to satisfy statute of frauds, where hired daughter was not able to practice law with firm at that time because she was not a member of the bar. MCA 28-2-901.

[4] Appeal and Error ⇐ 934(1)
30k934(1) Most Cited Cases
In appeals from orders granting summary judgment, standard of review is to resolve all factual disputes in favor of appellant, against whom summary judgment was granted.

[5] Judgment ⇐ 185.2(4)
228k185.2(4) Most Cited Cases
Party opposing summary judgment must come forward with substantial evidence raising issue of material fact.

****1314 *159** Alfred L. Bishop, Billings, for plaintiff and appellant.

R.P. Ryan, Billings, for defendant and respondent.

HUNT, Justice.

Alfred L. Bishop appeals an Order of the Yellowstone County District Court granting Robert E. Hendrickson's motion for summary judgment. The issues raised are two: first, whether a conversation between Bishop and Hendrickson constituted an enforceable contract to employ Bishop's daughter; and second, if so, whether Hendrickson breached that contract, proximately causing damage to Bishop. We find that Bishop has failed to raise a genuine issue of material fact to preclude entry of summary judgment. Accordingly, we affirm.

Bishop was employed by the law firm of Earl V. Cline and Hendrickson in 1952. After Cline's death, Hendrickson and Bishop formed a partnership, in 1965. In 1976, the partnership was expanded to take in Gary Everson under the partnership name of Hendrickson, Bishop and Everson. In 1978, the partners formed a professional corporation under the name of Hendrickson and Bishop, P.C.

Both Hendrickson and Bishop had daughters who attended law school. Hendrickson's daughter worked for the firm for approximately one year as a law clerk, but not as a lawyer. For personal reasons, she left the firm. Bishop's daughter Debbie began working with the firm after law school graduation. She worked for approximately one month. When Debbie inquired about getting paid,

she was told she would not be hired by the firm.

Bishop filed an amended complaint in District Court on April 4, 1983, alleging that at some point during their period of association, he and Hendrickson contracted with each other that "in the event any of their children ever became lawyers and wanted to practice law with the firm that there would be a place for such child or children in the law firm," and that Hendrickson had breached the contract by refusing to hire Debbie.

***160** Hendrickson filed a motion for summary judgment. On August 13, 1984, the District Court entered its order granting Hendrickson's motion for summary judgment, finding the alleged contract was highly uncertain, to-wit, "a place" in the law firm.

[1] It is well-settled that many contracts may be oral. Section 28-2- 901, MCA, provides:

"When contracts may be oral. All contracts may be oral except such as are specially required by statute to be in writing."

However, it is clear that a contract must be certain and that the words "a place" in the law firm for a person is not certain enough to meet the requirement. Restatement (Second) of Contracts § 33(1) (1979) states:

"Section 33. *Certainty.* (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract ***1315** unless the terms of the contract are reasonably certain."

[2] This alleged contract fails to satisfy that requirement. It is not certain whether children who may be born in the future come within such a contract; it is neither clear nor certain whether someone coming to the firm must be hired, and if so, to what position; and factors such as salary and terms of employment are totally unknown. At best, the alleged contract is ambiguous.

In his deposition of April 4, 1983, Bishop conceded the conversation took place "way back, many years ago, when the kids were little."

Bishop asserted Hendrickson reaffirmed the agreement on December 13, 1981, in a conversation with himself (Bishop) and others: "You know that Al and I have an agreement." It is Bishop's position that this statement disposed of any problem with the one-year requirement of the statute of frauds for oral contracts.

[3] In support of his argument that there was a contract, Bishop cited *Davis v. Davis* (1972), 159 Mont. 355, 497 P.2d 315, which provides that oral contracts, fully executed by one of the parties represent a well-recognized exception to the statute of frauds. Bishop contended the hiring of Hendrickson's daughter as a law clerk completed the oral contract and satisfied the statute of frauds. That is inconsistent even with his own assertion that the alleged agreement was to hire their children as lawyers, not as law clerks. Hendrickson's daughter was not able to practice law with the firm at that time because she was not a member of the Bar, and thus her work as ***161** a law clerk could not perfect the alleged agreement. Therefore we do not reach the point at which the *Davis* rationale applies.

[4][5] In appeals from orders granting summary judgment, the standard of review is to resolve all factual disputes in favor of the appellant, against whom summary judgment was granted. The party opposing summary judgment must come forward with substantial evidence raising an issue of material fact. *Stepanek v. Kober Const.* (Mont.1981), 625 P.2d 51, 52, 38 St.Rep. 385, 386.

Viewing the record in the light most favorable to Bishop, we do not find evidence to show the existence of an enforceable contract with Hendrickson to hire Debbie.

Accordingly, we affirm the order of the District Court.

TURNAGE, C.J., and WEBER, MORRISON, GULBRANDSON and HARRISON, JJ., concur.

215 Mont. 158, 695 P.2d 1313

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Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
NORTH COAST COOKIES, INC., Appellee and Cross-Appellant,
v.
SWEET TEMPTATIONS, INC. et al., Appellants and Cross-Appellees. [FN*]

FN* A motion to certify the record to the Supreme Court of Ohio was dismissed on application of the parties on September 12, 1984 (case No. 84-1185).

Nos. 47652, 47653.

July 23, 1984.

Purchaser sought specific performance of agreement to purchase assets and the leasehold of confectionary store and an injunction against transfer of those assets to anyone else. A competitor of purchaser was permitted to intervene. The Cuyahoga Court of Common Pleas ordered specific performance of the agreement and enjoined competitor from interfering with the transaction, and all parties appealed. The Court of Appeals, Markus, P.J., held that: (1) after reopening the closed trial to allow participation of competitor as intervenor, trial court did not abuse its discretion in accepting supplementary evidence rather than retrying the entire case; (2) the written and oral agreements collectively provided sufficient specificity to constitute a definite contract; and (3) written agreement which provided for the assignment of a long-term lease satisfied the statute of frauds.

Judgment affirmed.

Patton, J., dissented.

West Headnotes

[1] Appeal and Error ⇐ 724(2)
30k724(2) Most Cited Cases
The "Assignments of Error" should designate specific rulings which the appellant challenges on appeal; they may dispute the final judgment itself or other procedural events in the trial court. Rules App.Proc., Rule 12(A).

[2] Appeal and Error ⇐ 756
30k756 Most Cited Cases
The "Statement of Issues" should express one or more legal grounds to contest the procedural actions challenged by the assigned errors; they may subdivide questions presented by individual assigned errors, or they may be substantially equivalent to the assigned errors.

[3] Equity ⇐ 65(3)
150k65(3) Most Cited Cases
The "clean hands" doctrine concerns grossly inequitable behavior in the underlying transaction which is the subject matter of the suit.

[4] Equity ⇐ 65(1)
150k65(1) Most Cited Cases
A party's conduct in the litigation itself may cause it to suffer sanctions, but it will not invoke the "clean hands" doctrine.

[5] Parties ⇐ 29
287k29 Most Cited Cases
A litigant has no obligation to sue fully identified adverse entities, unless they are indispensable parties. Rules Civ.Proc., Rule 19(B).

[6] Parties ⇐ 51(4)
287k51(4) Most Cited Cases
Adverse litigant and persons who have not been sued can cause the joinder of a missing party whose absence jeopardizes their respective interests. Rules Civ.Proc., Rules 19(A), 24.

[7] Trial ⇐ 66
388k66 Most Cited Cases
After reopening a closed trial to allow the participation of an intervenor who had known about the suit but had not sought to intervene before the original trial, trial court did not abuse its discretion in accepting supplementary evidence rather than retrying the entire case.

[8] Specific Performance ⇐ 28(1)
358k28(1) Most Cited Cases

[8] Specific Performance ⇐ 28(2)
358k28(2) Most Cited Cases
Written and oral agreements between parties for the purchase of assets and leasehold of confectionary store collectively provided sufficient specificity to

constitute a definite contract and thus trial court properly ordered specific performance of the contract.

[9] Evidence ⇐ 400(2)
157k400(2) Most Cited Cases

[9] Evidence ⇐ 400(3)
157k400(3) Most Cited Cases
Where written contract for the purchase of assets and leasehold of confectionary store did not purport to constitute the entire agreement between the parties, the court properly received other evidence about the terms.

[10] Contracts ⇐ 355
95k355 Most Cited Cases
Trial court has discretion to fashion a remedy which supports the contracting parties' agreement and all fundamental terms.

[11] Appeal and Error ⇐ 842(8)
30k842(8) Most Cited Cases
The Court of Appeals will not substitute its judgment for the trial court's construction of a contract which is sufficiently supported by the evidence.

[12] Frauds, Statute Of ⇐ 106(2)
185k106(2) Most Cited Cases
The statute of frauds does not require that the parties' full agreement be reduced to writing, even though it involves realty transfers; rather, it mandates some writing signed by the party sought to be held or that party's authorized agent, so that the agreement's existence has sufficient certainty. R.C. § 1335.05.

[13] Frauds, Statute Of ⇐ 106(1)
185k106(1) Most Cited Cases
A memorandum satisfies the statute of frauds if it identifies the subject matter, establishes that a contract has been made, and states the essential terms with reasonable certainty. R.C. § 1335.05.

[14] Frauds, Statute Of ⇐ 113(2)
185k113(2) Most Cited Cases
A memorandum need not contain all the terms of the agreement in order to satisfy the statute of frauds. R.C. § 1335.05.

[15] Frauds, Statute Of ⇐ 107(2)
185k107(2) Most Cited Cases

[15] Frauds, Statute Of ⇐ 108(4)
185k108(4) Most Cited Cases

[15] Frauds, Statute Of ⇐ 109
185k109 Most Cited Cases
For an agreement to transfer a lease, the statute of frauds is satisfied by a signed writing which sufficiently identifies the parties, the lease involved and perhaps consideration for its transfer. R.C. § 1335.05.

[16] Frauds, Statute Of ⇐ 113(3)
185k113(3) Most Cited Cases
Written agreement for the purchase of assets and lease of confectionary store which called for the assignment of the remaining portion of the long-term lease provided sufficient certainty about the essential terms of the contract for purposes of the statute of frauds and its failure to state a specific date for the transfer of possession was not fatal; at the least, the writing evidenced an agreement between the parties that possession would transfer within a reasonable time. R.C. § 1335.05.

[17] Torts ⇐ 263
379k263 Most Cited Cases
(Formerly 379k27)
Substantial credible evidence supported court's finding that purchaser's competitor did not maliciously interfere with purchaser's contract to purchase assets and lease of confectionary store.

****390** Syllabus by the Court

***342** 1. Assignments of error should designate specific rulings which the appellant challenges on appeal. They may dispute the final judgment itself or other procedural events in the trial court. The statement of issues should express one or more legal grounds to contest the procedural actions challenged by the assigned errors.

2. The "clean hands" doctrine concerns grossly inequitable behavior in the *underlying transaction* which is the subject matter of the suit. A party's conduct *in the litigation itself* may cause it to suffer sanctions, but it will not invoke the clean hands doctrine.

3. After reopening a closed trial so a new intervenor can participate, the court has discretion to accept supplementary evidence rather than retrying

the entire case. Absent an affirmative showing that any party suffered unfair prejudice by the procedure used, no abuse of discretion results.

4. Where a written contract does not purport to constitute the entire agreement between the parties, the court may properly receive other evidence about its terms.

5. The Statute of Frauds (R.C. 1335.05) does not require that the parties' full agreement be reduced to writing, even though the agreement involves a transfer of realty. Rather, the statute mandates some writing signed by the party sought to be "charged" or that party's authorized agent, so that the agreement's existence has sufficient certainty.

6. A "memorandum" satisfies the Statute of Frauds (R.C. 1335.05) if it (1) identifies the subject matter of the *343 contract, (2) establishes that a contract has been made, and (3) states the essential terms of the contract with reasonable certainty.

7. In the assignment of a long-term lease, the Statute of Frauds (R.C. 1335.05) is satisfied by a signed writing which sufficiently identifies the parties, the lease involved, and the consideration for the transfer. Thus, the failure to state a specific date for the transfer of possession is not fatal; at the least, the writing evidences an agreement between the parties that possession would transfer within a reasonable time.

Guren, Merritt, Feibel, Sogg & Cohen and Stanley M. Fisher, Cleveland, for appellee and cross-appellant North Coast Cookies, Inc.

Benesch, Friedlander, Coplan & Aronoff, Edward Kancler and Kenneth A. Bravo, Cleveland, for appellant and cross-appellee Sweet Temptations, Inc.

Jones, Day, Reavis & Pogue, George J. Moscarino and James J. Little, Cleveland, for appellants and cross-appellees Cole Nat. Corp. and Original Cookie Co., Inc.

MARKUS, Presiding Judge.

A franchised retailer of gourmet cookies and ice cream negotiated to purchase assets and the leasehold of a confectionary store in a prestigious shopping mall. The trial court ruled that those negotiations produced a binding agreement between the plaintiff-purchaser and the defendant-seller. The court entered extensive findings and conclusions, ordered specific performance of their agreement, and enjoined a competitor cookie company from interfering with the transaction. All parties appeal.

I. The Issues

Each of the parties fails to comply with the requirements of App.R. 16(A) and Local App.R. 6, which govern the contents of appellate briefs. The defendant-seller (Sweet Temptations) and the purchaser's competitor (Cole National and its subsidiary Original Cookie, hereinafter collectively referred to as "Cole") filed joint briefs. Their principal brief asserts nine assignments of error which challenge eight of the trial court's factual findings and seven of its legal conclusions. For its cross-appeal, the plaintiff-purchaser (North Coast Cookies) asserts two errors which challenge two of the trial court's conclusions of law.

Following their assigned errors, each appellant has listed a distinctively different **391 "Statement of Issues," which purportedly encompass their respective assigned errors. Each appellant then presents its legal arguments which are structured around a paraphrase of its "Statement of Issues." After designating their initial list of assigned errors, appellants make no further reference to them.

App.R. 12(A) directs this court to determine the merits of appeals "on the assignments of error set forth in the briefs required by Rule 16." App.R. 12(A) further provides:

" * * * Errors not specifically pointed out in the record *and separately argued by brief may be disregarded.* All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." (Emphasis added.)

[1][2] The "Assignments of Error" should designate specific rulings which the appellant challenges on appeal. They may dispute the final judgment itself or other procedural events in the trial court. The "Statement of Issues" should express one or more legal grounds to contest the *344 procedural actions challenged by the assigned errors. They may

subdivide questions presented by individual assigned errors, or they may be substantially equivalent to the assigned errors.

In this case, we could summarily affirm, by rejecting both the appeal and the cross-appeal for failure to argue separately any assigned error. The parties' failure to argue their assigned errors prevents us from considering them. In the interest of fairness, we will treat their respective "Statement of Issues" as their assigned errors.

The defendant-seller and the purchaser's competitor claim that the trial court: (1) deprived them of a fair opportunity to prepare and present their evidence, (2) enforced an agreement without sufficient certainty and specificity, and (3) enforced an agreement without sufficient written commemoration to satisfy the Statute of Frauds. The plaintiff-purchaser challenges the court's rejection of its claim against its competitor for malicious interference with the purchase contract. The plaintiff-purchaser disputes that ruling as contrary to the manifest weight of the evidence.

The trial court's substantive rulings on these matters were each supported by adequate factual findings which were in turn supported by substantial evidence. The court did not abuse its discretion by the disputed procedural rulings. Further, the parties failed to request actions which would have effectively eliminated some of their complaints on appeal. Consequently, we affirm the trial court's judgment.

II. Limitations on Preparation and Presentation

Defendant-seller and plaintiff's competitor urge that the court denied them a reasonable opportunity to prove their contentions.

In its complaint, plaintiff-purchaser sought specific performance of its alleged purchase agreement and an injunction against the transfer of those assets to anyone else. The complaint also designated five unknown "John Doe" defendants who had tortiously interfered with plaintiff-purchaser's contract rights.

The court granted a temporary restraining order and extended it by consent of the parties to prevent defendant-seller from prematurely transferring its assets. Approximately one month after plaintiff filed this action, the court began a consolidated hearing on plaintiff's preliminary injunction motion and a trial on the merits. No party claims that this expeditious schedule unfairly prejudiced its rights.

[3][4][5][6] The Cole interests complain that plaintiff failed to name them as defendants in the complaint or by amendment before the trial began. [FN1] They contend ***345** that plaintiff ****392** knew their identity as the competitor who allegedly interfered with plaintiff's purchase contract. There is no dispute that the Cole interests were themselves seeking to purchase the same assets and leasehold.

FN1. The Cole interests assert that plaintiff had "unclean hands" because it described them as unidentified "John Does" rather than serving them as defendants. Cole claims that plaintiff thereby lost its right to equitable relief.
However, the "clean hands" doctrine concerns grossly inequitable behavior in the underlying transaction which is the subject matter of the suit. *Kinner v. Lake Shore & Michigan Southern Ry. Co.* (1904), 69 Ohio St. 339, 69 N.E. 614, paragraph one of the syllabus; *Goldberger v. Bexley Properties* (1983), 5 Ohio St.3d 82, 448 N.E.2d 1380. A party's conduct in the litigation itself may cause it to suffer sanctions, but it will not invoke the "clean hands" doctrine.
Further, a litigant has no obligation to sue fully identified adverse entities, unless they are indispensable parties. Civ.R. 19(B). The adverse litigant and persons who have not been sued can cause the joinder of a missing party whose absence jeopardizes their respective interests. Civ.R. 19(A) and 24.
However plaintiff described the Cole interests, it had no unilateral duty to name them as parties defendant. However anxious Cole may have been to participate, they had no reasonable complaint when they failed to seek timely intervention. However anxious defendant-seller may have been to have Cole interests as parties, it had no reasonable complaint when it did not assert that defense. Civ.R. 12(B)(7) and 19(A). Cf. *Layne v. Huffman* (1975), 42 Ohio St.2d 287, 327 N.E.2d 767 [71 O.O.2d 260].

Although the Cole interests knew about the suit from its outset, they made no request to intervene before the trial began. They had previously agreed to indemnify defendant-seller against this claim and presumably supplied counsel for defendant-seller. Cole's own counsel obtained permission to

participate as an *amicus curiae,* sat at the trial table with counsel for defendant-seller, and filed briefs.

[7] On the last day of the four-day trial, Cole moved to intervene formally so they could cross-examine defendant-seller's president. The court denied that motion, apparently because its tardy presentation disrupted orderly proceedings for a trial that was near completion. One month after the trial evidence closed, the court reviewed post-trial briefs and granted plaintiff's request to enforce plaintiff's purchase agreement.

One month later, defendant-seller filed a motion for relief from that judgment on the ground that the court should have allowed Cole to intervene. Even though the Cole interests were not parties then, they joined in that motion. In an apparent effort to consider all relevant evidence, the court vacated its judgment, made the Cole interests additional parties defendant, and reopened the trial. No party appealed then, or later assigned that order as error, so we need not determine its propriety.

At the further trial proceedings, the court allowed the Cole interests to cross-examine any witnesses callcd after intervention was denied in the previous proceedings. The court ultimately permitted all parties to present additional witnesses or documents, if they demonstrated their relevance by an application two days before the supplementary trial. The further trial began four months after the suit was filed, three months after the first segment of the trial, and one month after the court vacated its original judgment.

Defendant-seller recalled the shopping mall manager for further cross-examination as its sole witness at the supplementary trial. The Cole interests called plaintiff's president for further cross-examination as their sole witness. The plaintiff-purchaser presented testimony from several Cole officers. The court did not deny any party's request to call a witness or submit other relevant evidence. Following these proceedings, the court entered a new judgment enforcing the plaintiff's purchase agreement and enjoining the Cole interests from interfering with its accomplishment.

Defendant-seller and the Cole intervenors complain that the court: (a) refused to order a complete new trial which would -totally replace the evidence presented in the first proceedings, (b) denied them sufficient time to prepare for the second phase of the trial, and (c) denied them a continuance during the second phase of the trial to gather evidence in another state.

We see no possible prejudice to defendant-seller by any of the disputed procedures in the second phase of the trial. Defendant-seller had no right to have the ****393** Cole intervenors as parties or to depend on Cole for its evidence. Defendant-seller made no complaint about its opportunity to prepare for or ***346** present its case in the first trial. It cannot reasonably complain about its opportunity to supplement its evidence after it lost, simply because it had limited time to change the court's conclusions.

Likewise, we perceive no unfair prejudice to the intervening Cole interests. They were aware of the issues before suit was filed. They knew about the suit immediately. They did not seek to intervene before the original trial. They had counsel present throughout the first segment of the trial. Presumably defendant-seller's counsel cooperated with their counsel. Every discovery request they made was duly answered. Their request for a total new trial was premised solely on a claim that newly discovered evidence would change the original result. They were not precluded from discovering or presenting any clearly identified evidence. They made no clear request that the second phase of the trial be postponed.

In all these circumstances, the trial court did not abuse its discretion by the procedures used. Cf. *State v. Lane* (1976), 49 Ohio St.2d 77, 358 N.E.2d 1081 [3 O.O.3d 45], paragraph three of the syllabus (discretion in denying new trial for newly discovered evidence); *Edwards v. Edwards* (July 6, 1978), Cuyahoga App. No. 37347, unreported, at pages 4-5 (discretion in reopening concluded trial); *State v. Taylor* (Apr. 14, 1977), Cuyahoga App. No. 35861, unreported, at page 5 (discretion in reopening concluded trial).

III. Certainty and Specificity

Defendant-seller and plaintiff's competitor argue that the purchase agreement lacked sufficient certainty and specificity. They contend that the alleged contract was incomplete and that an agreement to agree is not enforceable by equitable

orders.

In *Mr. Mark Corp. v. Rush, Inc.* (1983), 11 Ohio App.3d 167, 169, 464 N.E.2d 586, this court applied the principles set forth in 1 Restatement of the Law 2d, Contracts (1981) 92, 95, Section 33 and its commentary:

" '§ 33. Certainty

" '(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.

" '(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

" '(3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.'

" ' * * * Comment *a* to Section 33 of the Restatement adds:

" ' * * * [T]he actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon. In such cases courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain.

" 'An offer which appears to be indefinite may be given precision by usage or trade or by course of dealing between the parties. Terms may be supplied by factual implication, and in recurring situations the law often supplies a term in the absence of agreement to the contrary. * * * Where the parties have intended to conclude a bargain, uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract.'

"Comment *f* to Section 33 notes at page 95:

" 'The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound; minor items are more likely to be left to the option of one of the parties or to what is customary or reasonable.' "

***347** See, also, 1 Corbin, Contracts (1963), Section 95.

****394** The Supreme Court approved and applied cognate language from the Restatement and Corbin, in *Normandy Place Assoc. v. Beyer* (1982), 2 Ohio St.3d 102, at 105-106, 443 N.E.2d 161.

[8] In this case, the presidents of the plaintiff-purchaser and the defendant-seller signed a document which said:

"3/19/83

"The undersigned agree that North Coast Cookies, Inc. will purchase the lease agreement, all furniture, trade fixtures and equipment of the store at Beachwood Place Mall in Beachwood, Ohio known as Sweet Temptations.

"The agreed upon amount is one hundred twenty thousand dollars ($120,000). Terms of physical store transfer and terms of the payment and interest will be further decided and shall be reasonable to both parties.

"This agreement is bound by the consideration of $2500.

"Agreed to by

/s/ Allan Fox pres.

Sweet Temptations, Inc.

"Agreed to by

/s/ Kenneth Dery

/s/ Robert Dery

North Coast Cookies, Inc."

[9] Since the document did not purport to constitute the entire agreement between the parties, the court properly received other evidence about the terms. Cf. *Ward v. Bickerstaff* (1946), 79 Ohio App. 362, 364, 73 N.E.2d 877; *Moeller v. Boeke* (1966), 5 Ohio App.2d 139, 141, 214 N.E.2d 240 [34 O.O.2d 288]; *Roudebush Realty Co. v. Toby* (1955), 99 Ohio App. 524, 135 N.E.2d 270 [59 O.O. 421].

Essentially undisputed testimony established that

the plaintiff-purchaser offered to pay cash immediately and to accept transfer of defendant-seller's assets promptly. The defendant-seller preferred to delay its receipt of the purchase price and to delay the transfer. The two parties subsequently agreed to a payment schedule, related interest payment, and a specific date for the plaintiff-purchaser to take possession. Thereafter, plaintiff-purchaser acceded to defendant-seller's request to advance the possession date one month, and its later request to return to the originally agreed date.

Defendant-seller and plaintiff's competitor argue that there was no enforceable agreement because (a) the duration of the lease being transferred remained unsettled, (b) a later prepared document containing miscellaneous additional provisions was never executed, and (c) plaintiff-purchaser failed to prove that the shopping mall would give its required consent to the lease transfer. None of these contentions has merits.

The two contracting parties unequivocally agreed to the transfer of defendant-seller's remaining lease, which had specific finite terms. They also agreed to a specific transfer date which would be the beginning of the leasehold assignment. Their later negotiations or agreements to modify an agreed transfer date did not destroy the existing contract. At most those later discussions produced possible amendments of an existing agreement.

Similarly, the defendant-seller's failure to execute a more formal contract with additional terms did not destroy the established agreement. The trial court had ample reason to conclude that the contracting parties had agreed upon all significant terms of their bargain. The court then had authority to fashion a remedy covering less significant matters that conformed with their expressed intentions, custom and practice in that field, or their reasonable expectancies.

[10][11] Since the two contracting parties expressed agreement to terms in Cole's later proposed purchase contract, the court could properly require them to comply with those terms. If no such written document existed, the court had discretion to fashion a remedy which supports the contracting parties' agreement **348 on all fundamental terms. Cf. 3 Restatement of the Law 2d, Contracts (1981) 179, Section 362, Comment *b; Mr. Mark Corp. v. Rush, Inc., supra.* We will not substitute our judgment for **395 the trial court's construction of the contract which is sufficiently supported by the evidence. Cf. *Toth Auto Lease, Inc. v. Palladina* (Jan. 27, 1983), Cuyahoga App. No. 44965, unreported.

Finally, the lack of certainty about the landlord's consent did not preclude the court's equitable orders. The shopping mall manager, who is also an officer of the landlord mall, testified that he approved the lease assignment to plaintiff-purchaser. He said that he lacked authority to grant formal approval. However, his actions and his apparent authority might well estop the landlord from denying its approval.

No one testified and no documentary evidence suggested that the landlord had disapproved or would disapprove the proposed lease assignment. Indeed, all evidence demonstrated that the plaintiff-purchaser is a highly desirable tenant with an established favorable history of leases from the same landlord. Some circumstantial evidence tended to show that the landlord would agree to the lease assignment, if it had not already done so.

In these circumstances, the trial court was warranted in directing that the transaction go forward. Of course, the court did not then have jurisdiction over the landlord, so the court could not enforce its orders against the landlord's wishes. However, the court did have jurisdiction over the contracting parties, so it could require their best efforts to obtain agreement from the landlord. The details of enforcement are best left to the trial court. Cf. *Mr. Mark Corp. v. Rush, Inc., supra,* 168, at fn. 2, 464 N.E.2d 586.

IV. The Statute of Frauds

The defendant-seller and the plaintiff's competitor contend that no writing satisfied the requirement in R.C. 1335.05 for the transfer of defendant-seller's leasehold interest. Since the lease assignment was a significant part of the total consideration for this transaction, they dispute the enforceability of the agreement. R.C. 1335.05 provides in pertinent part:

"No action shall be brought whereby to charge * * * a person upon an agreement made upon

consideration of * * * a contract or sale of lands, tenements or hereditaments, or interest in or concerning them * * * *unless the agreement upon which such action is brought, or some memorandum or note thereof,* is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized." (Emphasis added.)

This statute serves to ensure that transactions involving a transfer of realty interests are commemorated with sufficient solemnity. A signed writing provides greater assurance that the parties and the public can reliably know when such a transaction occurs. It supports the public policy favoring clarity in determining real estate interests and discourages indefinite or fraudulent claims about such interests.

[12] This statute does not require that the parties' full agreement be reduced to writing, even though it involves realty transfers. It does not concern the substance or form of such agreements. Rather, it mandates some writing signed by the party sought to be held or that party's authorized agent, so that the agreement's existence has sufficient certainty. Cf. *Ward v. Bickerstaff, supra.*

[13] The memorandum satisfies the Statute of Frauds if it (1) identifies the subject matter, (2) establishes that a contract has been made, and (3) states the essential terms with reasonable certainty. *Kling v. Bordner* (1901), 65 Ohio St. 86, 61 N.E. 148, paragraph one of the syllabus; *Jacobs v. Joseph E. Copp Co.* (1930), 123 ***349** Ohio St. 146, 151-152, 174 N.E. 353; 1 Restatement of the Law 2d, Contracts (1981), Section 131; 2 Corbin, Contracts (1950), Section 499.

[14][15] The memorandum need not contain all the terms of the agreement. *Normandy Place Assoc. v. Beyer, supra; Ward v. Bickerstaff, supra; Clotfelter v. Telker* (App.1947), 52 Ohio Law Abs. 268, 271-272, 83 N.E.2d 103; *Schafer v. Faylor* (1944), 74 Ohio App. 533, 536, 543, 60 ****396** N.E.2d 339 [30 O.O. 228]. For personalty, the legislature directs that those essential terms encompass only the quantity of goods sold. R.C. 1302.04. For an agreement to transfer a lease, the Statute of Frauds is satisfied by a signed writing which sufficiently identifies the parties, the lease involved, and perhaps the consideration for its transfer.

In addition to the signed agreement quoted above, the defendant-seller's president signed and sent the following letter to the landlord's manager:

"This letter will serve as official notice that I have reached written agreement with North Coast Cookies, Inc. [plaintiff-purchaser] who does business as David's Cookies for the assignment of my lease at Beachwood Place of the space currently known as Sweet Temptations.

"As we discussed on the phone last week, David's Cookies and their willingness and capability of doing both fresh baked cookies and the service of ice cream make them a preferred tenant. I am well aware of the success and history of David's Cookies with the Rouse Company [the controlling interest in the landlord mall].

"I will let you know the final date of the physical transfer of the premises just as soon as we have made a final decision on it with North Coast Cookies, Inc.

"Very truly yours,

"SWEET TEMPTATIONS, INC.

/s/ Allan Fox

Allan Fox, President

"cc: Mr. Kenneth Dery

Mr. Robert Dery

[officers of North Coast Cookies]"

Taken together, the two signed documents leave no room for doubt that the named parties had reached a definite agreement. The writings sufficiently identified the location of the leased property and the total consideration for the contract which included the lease assignment. The defendant-seller and the Cole interests again argue that the writing did not identify the duration of the lease transferred.

[16] We previously ruled that the written and oral agreements collectively provided sufficient specificity to constitute a definite contract. We now hold that the written agreement alone provided

sufficient certainty about the "essential terms" of that contract. It called for an assignment of the remaining portion of the relatively lengthy leasehold, which by its terms extended another five and one-half years.

Its failure to state a specific date for the transfer of possession did not cause its demise at the hands of the statute of Frauds. Cf. *Schafer v. Faylor, supra* (74 Ohio App.), at 539-540, 60 N.E.2d 339. Possession would reasonably transfer at the final closing of the transaction, if the parties did not agree otherwise. *Id.* At the least, the writing evidenced an agreement between the parties that possession would transfer within a reasonable time. A contrary rule would require every written contract for the sale of realty interests to contain the date for transfer of possession. Common experience rejects such a rule.

V. Plaintiff's Claim Regarding Cole's Alleged Malicious Interference With Plaintiff's Contract

[17] For its cross-appeal, plaintiff-purchaser challenges the trial court's findings that plaintiff's competitor (Cole) had not maliciously interfered *350 with the contract. In substance, the trial court found that the defendant-seller deceptively encouraged the Cole interests to continue negotiating the purchase after defendant-seller contracted with the plaintiff.

The court found that defendant-seller acted in bad faith to conceal details of its dealings with the plaintiff-purchaser. Defendant-seller supplied the Cole interests with a copy of the signed partial agreement but misrepresented to them that further terms remained unsettled. The Cole interests showed that document to multiple in-house legal counsel, who advised that the document alone was not a binding contract. Whether that advice was good or bad, it tends to deny malice by the Cole interests in their continued negotiation efforts.

**397 There was substantial credible evidence to support the court's findings that Cole did not maliciously interfere with plaintiff's contract. Consequently, we cannot conclude that the trial court's finding was contrary to the manifest weight of the evidence. Cf. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578 [8 O.O.3d 261], syllabus; *State, ex rel. Shady Acres Nursing Home, Inc., v. Rhodes* (1983), 7 Ohio St.3d 7, 8-9, 455 N.E.2d 489; *Kinney v. Mathias* (1984), 10 Ohio St.3d 72, 73-74, 461 N.E.2d 901.

Additionally, plaintiff-purchaser demonstrates no prejudice from the disputed finding. Plaintiff made no claim for compensatory or punitive damages in its original complaint or its later amended complaint. Aside from a request for costs and attorney fees, plaintiff's pleadings sought solely equitable relief against any party. In those circumstances, Civ.R. 54(C) precluded any monetary damage award even if the evidence had warranted it.

The court did order the Cole interests not to interfere with the completion of this transaction. Hence, plaintiff recovered all relief against Cole that its pleadings permitted. Plaintiff did not assign any refusal by the court to permit a timely amendment of plaintiff's pleadings, and the record shows no such refusal.

VI. Conclusion

None of the assigned errors or the issues raised for the appeal or the cross-appeal has merit. The trial court's judgment is affirmed.

Judgment affirmed.

McMANAMON, J., concurs.

PATTON, J., dissents.

16 Ohio App.3d 342, 476 N.E.2d 388, 16 O.B.R. 391

END OF DOCUMENT

Supreme Court of Kansas.
ARROWHEAD CONSTRUCTION COMPANY OF DODGE CITY, KANSAS, INC., Plaintiff,
v.
ESSEX CORPORATION and Heritage Construction Management Company, Defendants,
Universal Surety Company and Inland Insurance Company, Defendants, Appellants
and Cross-Appellees,
and
Frank Crotts and Glenn Henley, Defendants, Appellees and Cross-Appellants.
No. 54193.

April 29, 1983.

In an action for breach of contract, the Kearny District Court, J. Stephen Nyswonger, J., entered judgment in favor of individuals who performed work for a subcontractor on their counterclaims. Appeals were taken. The Supreme Court, Herd, J., held that: (1) the insurers who issued a labor and material payment bond were estopped from asserting that the bond was not a statutory public works bond; (2) the evidence established that there was a binding contract, despite the omission of the price term; (3) testimony concerning the fact that a statement was made, without reference to the content of that statement, was not hearsay; and (4) the trial court did not err in denying prejudgment interest to the individuals who performed work for the subcontractor.

Judgment affirmed.

West Headnotes

[1] Stipulations ⇐ 3
363k3 Most Cited Cases
Court is not bound by erroneous stipulations or admissions with regard to questions of law.

[2] Public Contracts ⇐ 44
316Ak44 Most Cited Cases
Statutory public works bond applies to "all indebtedness" incurred in making public improvements and such bond, properly filed, acts to discharge all liens filed in connection with construction. K.S.A. 60-1111.

[3] Municipal Corporations ⇐ 346
268k346 Most Cited Cases
Statutory public works bond furnished to city in connection with project for construction of low-income housing did not technically comply with public works bond statute in that bond limited its coverage to claimants having direct contract with general contractor. K.S.A. 60-1111.

[4] Estoppel ⇐ 3(1)
156k3(1) Most Cited Cases

[4] Estoppel ⇐ 68(1)
156k68(1) Most Cited Cases
As general rule, parties to action are bound by their pleadings and judicial declarations and are estopped to deny or contradict them where other parties relied thereon and changed their position by reason thereof.

[5] Estoppel ⇐ 79
156k79 Most Cited Cases

[5] Estoppel ⇐ 88(2)
156k88(2) Most Cited Cases
Insurers were estopped from changing their admission that labor and material payment bond was statutory public works bond where individuals who performed
work for subcontractor on project for construction of low-income housing relied on stipulation and in process gave up their ultimate remedy, foreclosure on their mechanics' lien. K.S.A. 60-1111.

[6] Appeal and Error ⇐ 161
30k161 Most Cited Cases

[6] Estoppel ⇐ 92(1)
156k92(1) Most Cited Cases
Party to litigation who acquiesces in judgment of trial court by accepting benefits thereof will be deemed to have acquiesced therein and may not adopt inconsistent position or appeal from the judgment.

[7] Contracts ⇐ 14
95k14 Most Cited Cases

[7] Contracts ⇐ 29
95k29 Most Cited Cases

Question of whether binding contract was entered into depends upon intention of parties and is question of fact.

[8] Contracts ⇐ 15
95k15 Most Cited Cases
In order for parties to form binding contract there must be meeting of minds on all essential terms thereof, but omission of a single term need not be fatal if actions of parties show conclusively that they have intended to conclude binding agreement.

[9] Contracts ⇐ 14
95k14 Most Cited Cases
If parties omit single term from contract, but show conclusively that they have intended to conclude a binding agreement, court will supply term which is reasonable in the circumstances.

[10] Contracts ⇐ 28(3)
95k28(3) Most Cited Cases
Evidence established that parties intended to be bound by contract for
performance of work for subcontractor on project for construction of low-income housing where parties discussed particulars of project beforehand, individuals who performed work began work, representative of sub-subcontractor visited individuals at project site where representative was informed of individuals' requested price, individuals continued working with no objection from sub-subcontractor and price sought by individuals was reasonable.

[11] Evidence ⇐ 314(1)
157k314(1) Most Cited Cases
"Hearsay" is evidence of out-of-court statement asserting that fact is true and offered to prove truth of the matter asserted. Rules of Evid., K.S.A. 60-460.

[12] Evidence ⇐ 314(1)
157k314(1) Most Cited Cases
Where no "statement" was offered, but rather, only the fact that declarant made a statement to witness was offered, but no one testified regarding content of that statement, testimony was not hearsay. Rules of Evid., K.S.A. 60-460.

[13] Interest ⇐ 44
219k44 Most Cited Cases
Where amount is due on contract and there is no uncertainty as to the amount which is due or the date on which it becomes due, creditor is entitled to recover interest from the due date.

[14] Interest ⇐ 19(1)
219k19(1) Most Cited Cases

[14] Interest ⇐ 39(2.30)
219k39(2.30) Most Cited Cases
(Formerly 219k39(2))
Where alleged contract under which individuals performed work for subcontractor did not state price for work performed, amount of damages suffered by individuals who performed work for subcontractor was not liquidated until trial court found that there was contract for $1.35 per square foot and, therefore, trial court did not err in denying prejudgment interest.

****1197 *241** Syllabus by the Court

1. A statutory public works bond, in accordance with K.S.A. 60-1111, applies to "all indebtedness" incurred in making public improvements. Such a bond acts to discharge all liens filed in connection with the construction of public improvements.

2. The question as to whether a binding contract was entered into depends upon the intention of the parties and is a question of fact.

3. In order for parties to form a binding contract there must be a meeting of the minds on all the essential terms thereof. However, the omission of a single term need not be fatal to the contract if the actions of the parties show conclusively they have intended to conclude a binding agreement. In such a case the court will supply a term which is reasonable in the circumstances. Restatement (Second) of Contracts §§ 33, 204 (1981).

4. As a general rule parties to an action are bound by their pleadings and judicial declarations and are estopped to deny or contradict them where the other parties to the action relied thereon and changed their position by reason thereof. 28 Am.Jur.2d, Estoppel and Waiver § 71, p. 701.

5. A party to litigation who acquiesces in the judgment of the trial court by accepting the benefits thereof will be deemed to have acquiesced therein and may not adopt an inconsistent position or appeal from the judgment. *Halpin v. Frankenberger,* 231 Kan. 344, 348, 644 P.2d 452 (1982).

6. Hearsay is evidence of an out-of-court statement asserting that a fact is true and offered to prove the truth of the matter asserted. K.S.A.1982 Supp. 60-460.

7. Where an amount is due upon a contract and there is no uncertainty as to the amount which is due or the date on which it becomes due, the creditor is entitled to recover interest from the due date.

Patricia Rose Myers of Reynolds, Peirce, Forker, Suter & O'Neal, Hutchinson, *242 and Patrick W. Kennison of Kutak, Rock & Huie, Omaha, Neb., argued the cause and Kenneth E. Peirce of Reynolds, Peirce, Forker, Suter & O'Neal, Hutchinson, was with him on the brief for the appellants and cross-appellees.

Scott E. Daniel of Daniel & Daniel, Garden City, argued the cause and was on the brief for appellees and cross-appellants.

HERD, Justice:

This is an action for breach of contract. The appeal is from the trial court's order granting judgment on the counterclaims of Frank Crotts and Glenn Henley.

A contract for the construction of a low-income housing project in Lakin is the issue from which this case arose. The original contract for the project was let to Essex Corporation as the general contractor on March 15, 1978. On March 23, 1978, Essex acquired a "Labor & Material Payment Bond" from Inland Insurance Company and Universal Surety Company.

Essex subcontracted the job to Heritage Construction Management Company. Pursuant to a contract dated April 21, 1978, Heritage subcontracted to Arrowhead Construction Company of Dodge City. Arrowhead then discussed a possible subcontract for some of the work with Frank Crotts and Glenn Henley. The existence of a firm contract between Crotts and Henley and Arrowhead is a matter of dispute and will be discussed in more detail later. Nevertheless, Crotts and Henley began work on the Lakin project on June 6, 1978, and completed a substantial portion of the work they set out to perform.

**1198 During the course of the construction project Heritage became concerned by the failure of Arrowhead to complete the job. As a result Heritage hired another contractor to finish the project. Arrowhead's last day on the Lakin project was August 3, 1978. On August 15, 1978, Arrowhead filed a mechanics' lien statement against the premises claiming a balance due from Heritage of $21,768.00. Crotts and Henley, in turn, filed a mechanics' lien on August 30, 1978, claiming a balance due from Arrowhead of $6897.00.

On December 11, 1978, Arrowhead filed a petition in Kearny County District Court listing as defendants Essex, Universal, Inland, Heritage, the City of Lakin and Crotts and Henley. The petition alleged Heritage breached its contract by failing to pay money owing to Arrowhead. It also alleged Essex was liable for *243 Heritage's debt as general contractor and that Universal and Inland were liable for the debt on the labor and material payment bond. Finally, it asked that the priority of Crotts and Henley's lien be determined in the same action. Crotts and Henley filed their answer asking the court to determine the liability of Essex, Universal and Inland. In their counterclaim against Arrowhead they alleged the existence of a contract between the two parties pursuant to which Arrowhead would pay Crotts and Henley $8397.00. Crotts and Henley claimed they performed their part of the bargain but that Arrowhead had paid them only $1500.00. Finally, Crotts and Henley filed a cross-claim alleging Essex, as the general contractor, was liable for Arrowhead's breach and that Universal and Inland were liable as sureties.

The other corporate defendants, Essex, Universal, Inland, and Heritage, were represented by John G. Sauer of Garden City. They filed their answer on February 9, 1979. With respect to Arrowhead's petition they offered twelve defenses, including the ninth which alleged, "Plaintiff cannot recover upon the labor and material payment bond because it failed to comply with the notice requirements thereof." In its counterclaim to Arrowhead's petition these defendants alleged breach of contract by Arrowhead.

With regard to Crotts and Henley's crossclaim these defendants offered nine defenses. Their fourth defense alleged "Defendants Crotts and Henley cannot recover upon the labor and material payment

bond because they failed to comply with the notice requirements thereof." The seventh defense claimed "Defendants Crotts and Henley cannot recover against any of these defendants because it lacks privity of contract with them." The eighth defense asserted, "Defendants Crotts and Henley are not a proper claimant under the labor and material bond as they have no direct contract with the principal, defendant Essex Corporation, or with the sub-contractor of the principal, defendant Heritage Construction Management Company."

On April 30, 1979, the defendants Essex, Universal, Inland, and Heritage, filed a "Motion for Judgment on the Pleadings" asking the court to discharge the liens previously filed by Arrowhead and Crotts and Henley. In support of this motion the defendants alleged the Labor and Material Payment Bond acquired ***244** by Essex was a "statutory public works" bond pursuant to K.S.A. 60-1111 which authorizes the discharge of previously filed liens when such a bond is filed with the district court.

On May 7, 1979, the district court issued an "Order Granting Judgment on the Pleadings." The court found the bond complied with K.S.A. 60-1111 as a public works bond and as such discharged the liens previously filed by Crotts and Henley and Arrowhead.

The May 7 order was the result of a compromise between the parties pursuant to which, on July 9, 1979, attorney Sauer filed "amendments" to the defendants' answers to the claims of Arrowhead and Crotts and Henley. The defendants admitted Arrowhead had complied with the notice requirements of the labor and material payment bond thereby abandoning their ninth defense.

****1199** With regard to the claims of Crotts and Henley the defendants' answer was amended to admit the allegations Essex was liable as general contractor in the absence of payment by its subcontractors and that Crotts and Henley had fully complied with the notice requirements of the labor and material payment bond. Accordingly, the defendants abandoned their defenses against Crotts and Henley dealing with privity and the notice requirements of the bond.

Armed with these admissions Crotts and Henley filed their own motion for judgment on the pleadings July 3, 1980, alleging Arrowhead had admitted the allegations in their counterclaims by failing to answer. On August 13, 1980, the trial court held: "the only factual controversy as to the amount due the defendants Crotts and Henley and the quality of their work is a question as to whether or not a certain overhang was built incorrectly ...." The court further found "this small controversy is separable from the other controversies involved in the case ..." and ordered it tried as a separate matter.

Previously, on October 18, 1979, attorney Sauer withdrew from the case and left the practice of law for another occupation. It was not until shortly before the court's order on August 13, 1980, severing the trial that defendants' present counsel, Mr. Kenneth Peirce, entered the case.

A year later on September 11, 1981, a pretrial conference was held. At that time the trial of Crotts and Henley's claim was set ***245** for September 22, 1981. The other issues were tentatively set for trial January 12, 1982. With regard to the claims of Crotts and Henley the court further stated in part:

"[I]f Crotts and Henley are successful in their claim for monies due and owing from Arrowhead, said sums shall be paid by Universal Surety Company and/or Inland Insurance Company. The Court finds as its basis for such ruling:

"1. The parties are estopped from asserting that no written notice of Crotts and Henley being subcontractors of Arrowhead because Essex and Heritage had actual knowledge of Crotts and Henley working on the project, and further Crotts and Henley received materials and directions from employees of Essex and Heritage.

"2. The defendants, Essex, Heritage, Universal and Inland waive their defense of written notice."

At the pretrial conference defendants requested they be allowed to withdraw their admissions made on July 9, 1979. They argued they were erroneous admissions of law. Essentially, defendants desired to reinstate their original answer. The trial court refused to grant their request.

The case was tried to the court on September 22, 1981. The trial court found for Crotts and Henley, holding they had a contract with Arrowhead at

$1.35 per square foot and granted them judgment in the amount of $6519.00 with interest at 12% from the date of judgment against Arrowhead with Universal Surety Company and Inland Insurance Company as sureties. The Court denied prejudgment interest.

The defendants Universal and Inland have appealed. Crotts and Henley also appeal the trial court's failure to award them prejudgment interest. The other matters scheduled to be tried in January of 1982 have been temporarily stayed.

Appellants first claim the trial court erred in refusing to allow them to reinstate their original answer by withdrawing the admissions made in the pleadings filed July 9, 1979. They argue their attorney John G. Sauer made errors of law in the admissions which are subject to correction.

[1] It is well established that a court is not bound by erroneous stipulations or admissions with regard to questions of law. *State, ex rel., v. Masterson,* 221 Kan. 540, 551, 561 P.2d 796 (1977); *Urban Renewal Agency v. Reed,* 211 Kan. 705, 712, 508 P.2d 1227 (1973).

The essence of this claim pertains to appellants' attorney's stipulation the labor **1200 and material payment bond is a statutory *246 public works bond in compliance with K.S.A. 60-1111 and that notice requirements had been met to invoke the bond. Let us examine the bond statute and review the circumstances surrounding the stipulations to determine if this issue falls within the definition of erroneous stipulation of law.

K.S.A. 60-1111 deals with public works bonds. It provides:

"Whenever any public official shall, under the laws of the state, enter into contract in any sum exceeding one thousand dollars ($1,000) with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take, from the party contracted with, a bond to the state of Kansas with good and sufficient sureties in a sum not less than the sum total in the contract, conditioned that such contractor or the subcontractor of said contractor shall pay all indebtedness incurred for labor furnished, materials, equipment, or supplies, used or consumed in connection with or in or about the construction of said public building or in making such public improvements."

"The bond shall be approved by and filed with the clerk of the district court of the county in which such public improvement is to be made. When such bond is filed, no lien shall attach under this article, and if when such bond is filed liens have already been filed, such liens shall be discharged. Any person to whom there is due any sum for labor or material furnished, as stated in the preceding section, or his or her assigns, may bring an action on said bond for the recovery of said indebtedness but no action shall be brought on said bond after six (6) months from the completion of said public improvements or public buildings."

The bond furnished by Essex, as principal, was issued in favor of the City of Lakin. It provided in pertinent part:

"THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Principal shall promptly make payment to claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the contract then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

"A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of Principal ...."

[2][3] A statutory public works bond has two characteristics which are important to a discussion of this issue. First, such a bond applies to "all indebtedness" incurred in making public improvements. Thus, no privity with the general contractor is required. Second, such a bond, properly filed, acts to discharge all liens filed in connection with the construction. It is apparent the bond furnished the City of Lakin did not technically comply with the statute since it limited its coverage to claimants having a direct contract with Essex.

This case presents a complicated factual situation. Arrowhead *247 and Crotts and Henley had filed mechanics' liens on the premises. Appellants could not be paid until the liens were released. They were therefore anxious to have the liens discharged. Through their attorney they requested the trial court to declare the labor and material payment bond acquired by Essex a public works bond pursuant to

K.S.A. 60-1111. Such a holding would operate to discharge the liens. The trial court relied on appellants' stipulation and granted the request on May 7, 1979. Later appellants amended their pleadings to conform to the May 7 order and struck the defenses relating to the privity and notice requirements of the bond. Now appellants wish to withdraw the amendments to enable them to argue Crotts and Henley are not claimants under the express conditions of the bond.

Essentially, then, appellants are claiming the May 7 order which declared the bond was a statutory public works bond pursuant to K.S.A. 60-1111 was based on a mistake of law. Appellants' theory is that in the motion asking for the May 7 order and in **1201 the subsequent amendments to appellants' original pleadings, their attorney made erroneous admissions of law. Indeed, it is true the stipulation turned the labor and material payment bond into something it technically was not.

However, important reasons weigh against reversal of the trial court. First, contrary to appellants' argument, there was no mistake of law. Mr. Sauer was obviously quite aware a public works bond was required of Essex and the one on file did not comply with the statute. He was also aware the failure to file a proper bond would prevent the city from paying Essex. Finally, he was concerned about the liens filed by Arrowhead and Crotts and Henley. Sauer set out to remedy this situation by stipulating the bond's coverage to meet the statutory requirements. This stipulation was agreed to by all parties and the trial court. No one was operating under any mistaken beliefs.

[4][5] Further, this is a classic case for the assertion of the doctrine of estoppel. As a general rule parties to an action are bound by their pleadings and judicial declarations and are estopped to deny or contradict them where the other parties to the action relied thereon and changed their position by reason thereof. 28 Am.Jur.2d, Estoppel and Waiver § 71, p. 701. As noted above Crotts and Henley did not object to the stipulation that the bond was a statutory public works bond. Instead they relied on the stipulation *248 and in the process gave up their ultimate remedy-- foreclosure on their lien. They then had to depend upon their ability to prove their breach of contract claim against Arrowhead. Obviously, it would be prejudicial to Crotts and Henley to allow appellants to change their position at this late date. See *Cosgrove v. Young,* 230 Kan. 705, Syl. ¶ 6, 642 P.2d 75 (1981).

[6] Finally, appellants previously acquiesced in the trial court's judgment to their benefit and cannot now object to it on appeal. *Halpin v. Frankenberger,* 231 Kan. 344, 348, 644 P.2d 452 (1982).

Appellants next argue the trial court erred in finding a firm contract existed between Crotts and Henley and Arrowhead.

[7] The question as to whether a binding contract was entered into depends upon the intention of the parties and is a question of fact. *Augusta Bank & Trust v. Broomfield,* 231 Kan. 52, 60, 643 P.2d 100 (1982). As such, this court's function is only to determine if the trial court's finding there was a contract is supported by substantial competent evidence. *International Petroleum Services, Inc. v. S & N Well Service, Inc.,* 230 Kan. 452, Syl. ¶ 8, 639 P.2d 29 (1982). If it is, there was no error.

In *Steele v. Harrison,* 220 Kan. 422, 428, 552 P.2d 957 (1976), this court reiterated the basic rules regarding contract formation:

"In order for parties to form a binding contract there must be a meeting of the minds on all the essential terms thereof. [Citations omitted.] To constitute a meeting of the minds there must be a fair understanding between the parties which normally accompanies mutual consent and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract."

See also *Sidwell Oil & Gas Co. v. Loyd,* 230 Kan. 77, 79, 630 P.2d 1107 (1981).

Appellants argue here the parties had not agreed on the essential term of price. The evidence shows Arrowhead and Crotts had originally discussed a "ball park" base bid figure of around $1.25 per square foot for rough framing carpentry work, but a firm figure was never specifically agreed on. Nevertheless, Crotts and Henley began work and later received a written contract from Arrowhead specifying payment at $1.25 per square foot. Crotts never signed that contract but instead informed Arrowhead he would require payment of $1.35 per square foot. Crotts and Henley

continued to work until they realized they were not going to be paid. Nothing was ever settled regarding the price.

***249** [8] The Restatement (Second) of Contracts § 33 (1981), offers some guidance here:

****1202** "(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.

"(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

"(3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance."

Comment a to this section makes clear the omission of a single term is not always fatal to the contract:

"[T]he actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon. In such cases courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain.

"An offer which appears to be indefinite may be given precision by usage of trade or by course of dealing between the parties. Terms may be supplied by factual implication, and in recurring situations the law often supplies a term in the absence of agreement to the contrary."

[9] The Restatement assumes courts will, in such instances, supply a term which is "reasonable in the circumstances." (See Section 204.) This term should be one which "comports with community standards of fairness and policy ...." Comment d, § 204. More specifically, Comment e to Section 33 states:

"Where the parties manifest an intention not to be bound unless the amount of money to be paid by one of them is fixed or agreed and it is not fixed or agreed there is no contract. Uniform Commercial Code § 2-305(4). Where they intend to conclude a contract for the sale of goods, however, and the price is not settled, the price is a reasonable price at the time of delivery if (a) nothing is said as to price, or (b) the price is left to be agreed by the parties and they fail to agree, or (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded. Uniform Commercial Code § 2- 305(1). Or one party may be given power to fix the price within the limits set by agreement or custom or good faith. Similar principles apply to contracts for the rendition of service."

[10] Here the evidence clearly shows the parties intended to be bound by a contract. They discussed the particulars of the project beforehand, Crotts and Henley began work, a representative of Arrowhead visited with them at the project site where Crotts and Henley informed him of their requested price, and Crotts and Henley continued working with no objection from Arrowhead. ***250** Further, the reasonableness of the price term supplied by the trial court is clear. At trial Arrowhead's principal, Wayne Hunter, testified "for the amount of work they had to do and under the circumstances $1.35 would have been extremely reasonable." This issue is without merit.

Appellants next argue the trial court erred in admitting the hearsay testimony of Tony Bottiato, an employee of Heritage.

One of the issues at trial was whether Crotts and Henley had properly constructed a certain overhang. Crotts claimed he had no details regarding the specific length of the overhangs, so he asked Mr. Bottiato, who was at the jobsite. Following is an excerpt from the transcript:

"Q: After you had completed the structuring end of this unit, of the storage area, how did you decide what length to cut the overhangs?

"A: We inquired of Mr. Bottiato what they required for overhang on that since we didn't have any details. He figured a little bit and said--

"MR. PEIRCE: (Interrupting) Objection to anything he might have said, Your Honor.

"MR. DANIEL: I would advance the argument that Mr. Bottiato is a project ****1203** engineer for Heritage and is in fact an agent or representative of Heritage Construction Company, and that's a statement against interest and well within--

"THE COURT: (Interrupting) In this instance, the objection is overruled and he may answer.

"Q: (By Mr. Daniel) What were you told by Mr. Bottiato?

"THE COURT: No. That's not the question that was asked.

"MR. DANIEL: Could you read it back for me,

please?

....

"Q: (By Mr. Daniel) Could you answer that, please?

"A: Yes, sir. We made an inquiry of Mr. Bottiato what was required as a overhang on these units seeing as we didn't have any plans, and he did figure a little bit and indicated to us what they required that they wanted for an overhang.

"Q: Pursuant to those indications, did you in fact cut the rafters at that point in time?

"A: Yes, sir."

[11][12] Hearsay is evidence of an out-of-court statement asserting that a fact is true and offered to prove the truth of the matter asserted. K.S.A.1982 Supp. 60-460. Here, no "statement" was offered. There was only the fact that Mr. Bottiato made a statement to Crotts. No one testified regarding the content of that statement. As such, the evidence was not hearsay.

In their cross-appeal Crotts and Henley argue the trial court erred in not awarding them prejudgment interest on their damages.

***251** [13][14] In *First National Bank v. Bankers Dispatch Corporation,* 221 Kan. 528, 537, 562 P.2d 32 (1977), this court set out the general rule regarding prejudgment interest on damages in a breach of contract action:

"Where an amount is due upon contract, either expressed or implied, and there is no uncertainty as to the amount which is due or the date on which it becomes due, the creditor is entitled to recover interest from the due date."

Appellees cite *Phelps Dodge Copper Products Corp. v. Alpha Construction Co.,* 203 Kan. 591, 455 P.2d 555 (1969), for their claim that the fact there was a question as to the amount of setoff to be awarded to appellants does not change the liquidated nature of the appellee's damages on breach of contract. This is true. In *Phelps,* however, the trial court found the total indebtedness due on account was not disputed. Here, on the other hand, that amount was contested. Appellants claim there was never a firm contract and if there was, the price was $1.25 per square foot. Thus the amount of damages was not liquidated until the trial court found there was a contract for $1.35 per square foot and entered judgment accordingly. The trial court did not err in denying prejudgment interest.

The judgment of the trial court is affirmed.

233 Kan. 241, 662 P.2d 1195

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Intermediate Court of Appeals of Hawai'i.
Ludvina ALMEIDA, Plaintiff-Appellee,
v.
George Thomas ALMEIDA, Defendant-Appellant.
No. 8651.

Sept. 9, 1983.

Suit was instituted to divest defendant of his interest in certain real property and to vest that interest in plaintiff as his joint tenant. The Second Circuit Court, Maui County, Kase Higa, J., entered judgment for plaintiff, and defendant appealed. The Intermediate Court of Appeals, Tanaka, J., held that: (1) denial of motion to dismiss complaint on grounds that plaintiff failed to join an indispensable party was not reversible error; (2) finding that plaintiff's deed to property was not a gift, but in consideration of defendant's agreement to care for her after his retirement from military service was supported by clear and convincing evidence; (3) defendant's agreement with plaintiff was not so lacking in reasonable certainty as to preclude its enforcement; (4) suit was filed within one month of time defendant breached agreement and, hence, was timely commenced within six-year period of limitations; (5) doctrine of laches did not apply in absence of a showing of extraordinary circumstances; (6) proper remedy was not an award of damages instead of divestiture on ground that defendant's oral promise to plaintiff was a covenant rather than a condition subsequent; (7) it was unnecessary to require cograntor to join in lawsuit; and (8) plaintiff did not have an adequate remedy at law so as to preclude the equitable remedy of divestiture.

Affirmed.

West Headnotes

[1] Parties ⇐ 18
287k18 Most Cited Cases

[1] Parties ⇐ 29
287k29 Most Cited Cases
Rule regarding indispensable parties is founded on equitable considerations and is not jurisdictional. Fed.Rules Civ.Proc.Rules 19, 19 note, 28 U.S.C.A.; Rules Civ.Proc., Rules 19, 19(b).

[2] Pretrial Procedure ⇐ 558
307Ak558 Most Cited Cases
Even if an absent party is needed for just adjudication of a claim, a decision to dismiss must be based on the test of pragmatic equity and good conscience. Fed.Rules Civ.Proc.Rules 19, 19 note, 28 U.S.C.A.; Rules Civ.Proc., Rules 19, 19(b).

[3] Appeal and Error ⇐ 1061.2
30k1061.2 Most Cited Cases
Denial of defendant's motion to dismiss divestiture action, based on failure to join a cograntor as an indispensable party, was not reversible error, where defendant waited to file his motion until day of trial when plaintiff was in court ready to proceed, and since a decision on the merits would not be binding on the cograntor, it was unlikely that the cograntor would be adversely affected in a practical sense. Fed.Rules Civ.Proc.Rules 19, 19 note, 28 U.S.C.A.; Rules Civ.Proc., Rules 19, 19(b).

[4] Gifts ⇐ 1
191k1 Most Cited Cases
A "gift" is a voluntary transfer of property by one person to another without any consideration or compensation therefor and contains as essential elements, a donative intent, delivery and acceptance.

[5] Gifts ⇐ 47(1)
191k47(1) Most Cited Cases
The burden of proving an alleged gift is generally on the donee, but in cases of close kinship, there is a presumption that a gift was intended, and the presumption must be rebutted by clear and convincing evidence.

[6] Evidence ⇐ 596(1)
157k596(1) Most Cited Cases
Evidence of a clear and convincing nature is such evidence as will produce in the mind of a reasonable person a firm belief as to the facts sought to be established.

[7] Evidence ⇐ 596(1)
157k596(1) Most Cited Cases
A conflict in evidence will not preclude the evidence from being clear and convincing since the trier of fact may resolve the conflict on the basis of the credibility of the witnesses and the weight of the evidence.

[8] Gifts ⇐ 49(4)
191k49(4) Most Cited Cases
Finding that the deed by which plaintiff and her cograntor conveyed a joint interest in property to defendant was not executed as a gift, but was executed in consideration of defendant's agreement to care for plaintiff after his retirement from military service was supported by clear and convincing evidence in action to divest defendant of his interest in property when he failed and refused to perform his part of agreement.

[9] Contracts ⇐ 9(1)
95k9(1) Most Cited Cases
The law leans against the destruction of contracts for uncertainty and in favor of the determination that an agreement is sufficiently definite.

[10] Contracts ⇐ 9(2)
95k9(2) Most Cited Cases
An agreement to support a person is not uncertain because a court or jury can determine in each case what performance is reasonably necessary for support.

[11] Contracts ⇐ 9(2)
95k9(2) Most Cited Cases
Agreement whereby defendant was to care for plaintiff's needs for remainder of her life upon his retirement from military service, in return for which she would deed to him certain real property, was not so lacking in reasonable certainty as to preclude its enforceability.

[12] Limitation of Actions ⇐ 46(6)
241k46(6) Most Cited Cases
The statute of limitations does not generally begin to run on a contract until it is breached, but in the absence of a repudiation, the statute does not begin to run until the agreement is to be performed. HRS § 657-1.

[13] Limitation of Actions ⇐ 46(1)
241k46(1) Most Cited Cases
Suit to divest defendant of his interest in certain real property on ground of his failure to fulfill his agreement to care for plaintiff's needs upon his retirement from military service was commenced in October of 1980, only a short time after his retirement from military service in September of 1980, and was timely filed within applicable six-year period of limitations absent evidence that his refusal to reconvey his interest in property to plaintiff in 1970 was an anticipatory breach of his agreement. HRS § 657-1.

[14] Equity ⇐ 67
150k67 Most Cited Cases
The laches doctrine is based on the maxim that equity aids the vigilant, not those who slumber on their rights.

[15] Equity ⇐ 87(2)
150k87(2) Most Cited Cases
The doctrine of laches did not apply to preclude plaintiff from bringing an action to divest her son, the defendant, from certain real property upon his failure to fulfill his agreement to care for the plaintiff's needs where the action was commenced within a month of the time the applicable six-year period of limitations began to run. HRS § 657-1.

[16] Cancellation of Instruments ⇐ 3
69k3 Most Cited Cases
Although the courts have decreed rescission and cancellation or reconveyance upon a breach of a promise to support when the promise is deemed to be a condition subsequent, the absence of a condition subsequent will not preclude a court from decreeing rescission and cancellation or other equitable remedy.

[17] Cancellation of Instruments ⇐ 14
69k14 Most Cited Cases

[17] Contracts ⇐ 83
95k83 Most Cited Cases
Where plaintiff, who was of advanced age, had property conveyed to herself and her son, the defendant, in consideration of defendant's oral promise to support her, breached his agreement, there was a failure of consideration and, even assuming that defendant's promise to support was not a condition subsequent, trial court was authorized and was vested with discretion to grant plaintiff divestiture rather than to award damages.

[18] Equity ⇐ 1
150k1 Most Cited Cases

[18] Judgment ⇐ 204
228k204 Most Cited Cases
The relief granted in equity is dictated by the equitable requirements of the situation at hand and

must be adapted to the facts and circumstances of the particular case.

[19] Cancellation of Instruments ⇐ 35(1)
69k35(1) Most Cited Cases

[19] Cancellation of Instruments ⇐ 56
69k56 Most Cited Cases
Where plaintiff had right to have her son's interest in property restored to her consensually or by judicial action, but did neither and, instead, caused her first son to convey property together with herself to the defendant, her second son, by deed, and defendant failed in his oral promise to support plaintiff which he gave as consideration for deed, trial court could properly mold its decree to divest defendant's interest in property and vest same in plaintiff, and it was unnecessary to require first son to join in lawsuit.

[20] Cancellation of Instruments ⇐ 3
69k3 Most Cited Cases
Where there has been a failure of consideration of support for a deed, equitable remedy of rescission and cancellation is proper, especially where grantor is aged.

[21] Cancellation of Instruments ⇐ 10
69k10 Most Cited Cases
Although trial court concluded, in the alternative, that the property could remain in the names of the plaintiff and defendant as joint tenants, provided that plaintiff would have the beneficial interest of the property during her lifetime and that defendant would pay plaintiff $250 per month, where defendant represented that he was unable to pay $250 monthly, there was no adequate remedy at law and trial court did not, therefore, err in ordering an equitable remedy of divestiture upon failure of consideration of support for a deed.

Deeds ⇐ 17(4)
120k17(4) Most Cited Cases
Where the consideration for a deed is an agreement of support, the courts tend to be lenient toward the grantor, especially if the grantor is aged. The relief accorded such grantor may be rescission and cancellation of the deed or other equitable remedies.

Limitation of Actions ⇐ 16
241k16 Most Cited Cases
In the absence of extraordinary circumstances, a court of equity will usually grant or withhold relief in analogy to the statute of limitations relating to law actions of like character.

****176** Syllabus by the Court

1. ***513** The rule regarding indispensable parties is founded on equitable considerations and is not jurisdictional. Even if an absent party is deemed needed for the just adjudication of a claim, a decision to dismiss must be based on the pragmatic "equity and good conscience" test of Rule 19(b), Hawaii Rules of Civil Procedure.

2. Where defendant delayed in making his motion to dismiss the complaint on the ground that plaintiff failed to join an indispensable party until the very morning of the trial and the absent party would not be adversely affected, the denial of the motion was not reversible error.

3. A gift is a voluntary transfer of property by one person to another without any consideration or compensation and its essential elements are donative intent, delivery, and acceptance.

4. The burden of proving an alleged gift is usually on the donee. However, in cases of close kinship between the donor and donee, there is a presumption that a gift was intended and the presumption must be rebutted by clear and convincing evidence.

5. An agreement to support a person is not uncertain because a court or jury can determine in each case what performance is reasonably necessary for support.

6. Generally, the statute of limitations does not begin to run on a contract until it is breached. In the absence of repudiation, the limitations period does not begin to run until the contract is to be performed.

7. ***514** In the absence of extraordinary circumstances, a court of equity will usually grant or withhold relief in analogy to the statute of limitations relating to law actions of like character.

8. Where the consideration for a deed is an agreement of support, the courts tend to be lenient toward the grantor, especially if the grantor is aged. The relief accorded such grantor may be rescission and cancellation of the deed or other equitable remedies.

9. The relief granted in equity is dictated by the equitable requirements of the situation and must be adapted to the facts and circumstances of the particular case.

*525 Edward S. Kushi, Jr., Wailuku, (Law Offices of Lawrence N.C. Ing, Crockett & Nakamura, Wailuku, of counsel), for defendant-appellant.

Edward F. Mason, Wailuku (Mason and Scott, Wailuku, of counsel), for plaintiff-appellee.

Before *513 BURNS, C.J., and HEEN and TANAKA, JJ.

TANAKA, Judge.

Defendant George Thomas Almeida (George) appeals from the judgment divesting him of his interest in certain real property **177 and vesting it in his joint tenant, plaintiff Ludvina Almeida (Mrs. Almeida). We affirm.

The action involves Lot 12-B, area 12,000 square feet, together with an undivided one-half interest in a roadway lot and two easements (the Property), located in Pukalani, Maui. Mrs. Almeida and her husband, Manuel Almeida (Mr. Almeida), acquired the Property in 1951. By deed dated December 26, 1961, Mr. and Mrs. Almeida conveyed the Property to their son George and his wife Mildred S. Almeida (Mildred). Upon the request of Mrs. Almeida, George and Mildred conveyed the Property to her by deed dated March 12, 1963.

Shortly after Mr. Almeida died in 1964, Mrs. Almeida built a house on the Property where she has since resided. By deed dated March 19, 1965, Mrs. Almeida conveyed the Property to herself and her son Harry Almeida (Harry), as joint tenants. By deed dated February 15, 1968 (1968 Deed), Mrs. Almeida and Harry conveyed the Property to Mrs. Almeida and George, as joint tenants.

On October 22, 1980, Mrs. Almeida filed a complaint alleging, *inter alia,* that (1) she and George agreed that upon his retirement from military service, George would return to Maui, reside with her, and care for her needs for the rest of her life and, in return, she would insure that he would become the *515 owner of the Property upon her death; (2) she fulfilled her end of the promise by the execution of the 1968 Deed; and (3) George failed and refused to perform his part of the agreement. She sought a decree divesting George of all right, title and interest in the Property.

George counterclaimed alleging joint ownership of the Property and seeking partition.

After a bench trial, the trial court entered its findings of fact and conclusions of law on October 20, 1981 and its judgment on December 9, 1981. The judgment "divested" George of his "right, title and interest" in the Property, "vested" the same in Mrs. Almeida and dismissed George's counterclaim. George appeals.

The issues on appeal are whether the trial court erred (1) in denying George's motion to dismiss for want of an indispensable party, (2) in failing to find that the 1968 Deed effected a gift of a joint interest in the Property to George, (3) in finding an agreement by George to care for Mrs. Almeida, (4) in ruling against George's affirmative defenses of statute of limitations and laches, and (5) in decreeing divestiture of George's interest in the Property. We find no reversible error.

I.

On the morning of September 8, 1981, when the trial commenced, George filed a motion to dismiss the complaint. He contended, *inter alia,* that the complaint should be dismissed because, as a co-grantor in the 1968 Deed, Harry was an indispensable party to the suit. On the same morning, the trial court orally denied the motion. [FN1]

FN1. No written order denying the motion to dismiss was filed.

[1][2] At the outset, we observe that Rule 19, Hawaii Rules of Civil Procedure (HRCP) (1981), [FN2] regarding indispensable parties *516 **178 is founded on equitable considerations, and is not jurisdictional." *Midkiff v. Kobayashi,* 54 Haw. 299, 324, 507 P.2d 724, 739 (1973). Even if an absentee is deemed needed for the just adjudication of a claim, a decision to dismiss must be based on the pragmatic "equity and good conscience" test of Rule 19(b), HRCP. Therefore, after the conclusion of a trial on the merits, there is reluctance on the part of an appellate court to overturn the trial court's

decision as to indispensable parties, unless there is real prejudice to the absentee. 7 C. Wright & A. Miller, Federal Practice and Procedure: *Civil* § 1609 (1972).

FN2. The applicable provisions of Rule 19, Hawaii Rules of Civil Procedure (1981), provide:
(a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.
(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

We are aware of the pronouncement of our supreme court that the "[a]bsence of indispensable parties can be raised at any time even by a reviewing court on its own motion." *Haiku Plantations Ass'n v. Lono,* 56 Haw. 96, 103, 529 P.2d 1, 5 (1974) (quoting *Filipino Federation of America v. Cubico,* 46 Haw. 353, 369, 380 P.2d 488, 497 (1963)).

We are also cognizant of the fact that Rule 19, HRCP, was amended in 1972 to conform to Rule 19, Federal Rules of Civil Procedure, as revised in 1966. The Advisory Committee on the Federal Rules of Civil Procedure, in its Note on the 1966 Revision of Rule 19, quoted at 3A J. Moore & J. Lucas, Federal Practice ¶ 19.01[5.-4] (2d ed. 1982), comments as follows:

***517** [W]hen the moving party is seeking dismissal in order to protect himself against a later suit by the absent person ..., and is not seeking vacariously [sic] to protect the absent person against a prejudicial judgment ..., his undue delay in making the motion can properly be counted against him as a reason for denying the motion.

In *National Board of YWCA v. YWCA of Charleston, S.C.,* 335 F.Supp. 615 (D.S.C.1971), defendant moved to dismiss the complaint on the ground that plaintiff failed to join an indispensable party. The court held that "defendant's delay in making its motion until the very morning of trial would warrant its denial because of laches." *Id.* at 627.

[3] George's primary complaint is that the absence of Harry may subject George to "multiple suits and result in inconsistent judicial decisions imposing undue hardship" on him. Reply Brief at 5. Applying the above principles, we believe that it was fatal for George to have waited to file his motion until the day of trial when Mrs. Almeida was in court ready to proceed. Furthermore, it appeared unlikely that Harry would be adversely affected in a practical sense. A decision on the merits would not have been binding on him.

Consequently, we hold that the trial court's denial of George's motion to dismiss was not reversible error.

II.

[4] "A 'gift' is generally defined as a voluntary transfer of property by one person to another without any consideration or compensation therefor." *Welton v. Gallagher,* 2 Haw.App. 242, 245, 630 P.2d 1077, 1081 (1982), *aff'd,* 65 Haw. 528, 654 P.2d 1349 (1982). To constitute a gift, the essential elements are (1) donative intent, (2) delivery, and (3) acceptance. *Estate of Lalakea,* 26 Haw. 243 (1922); 38 Am.Jur.2d *Gifts* §§ 17, 20, 34 (1968).

There is no dispute as to delivery and acceptance of the 1968 Deed in this case. The bone of contention

is the element of donative intent.

[5] Generally, the burden of proving an alleged gift is on the donee. *Siko v. Seguirant,* 51 Haw. 118, 452 P.2d 447 (1969); *Welton v. Gallagher, supra.* However, in cases **179 of close kinship, *518 there is a presumption that a gift was intended and the presumption must be rebutted by clear and convincing evidence. *Ables v. Ables,* 39 Haw. 598 (1952); *Welton v. Gallagher,* 2 Haw.App. at 245 n. 1, 630 P.2d at 1081.

Claiming that Mrs. Almeida failed by clear and convincing evidence to rebut the presumption that the 1968 Deed conveying a joint interest in the Property to him was a gift, George contends that the trial court erred in not finding a gift. On the other hand, Mrs. Almeida argues that the evidence was clear and convincing that the conveyance was in consideration of George's agreement to care for her after his retirement from military service; therefore, no gift was intended or involved.

[6][7] Clear and convincing evidence means such evidence as will produce "in the mind of a reasonable person a firm belief as to the facts sought to be established." *Welton v. Gallagher,* 2 Haw.App. at 246, 630 P.2d at 1081. We do not believe that conflicting evidence *per se* precludes it from being clear and convincing. The trier of fact must resolve "the conflicting evidence based on the credibility of the witnesses and the weight of the evidence." *Anders v. State,* 60 Haw. 381, 392, 590 P.2d 564, 570 (1979). *See also MPM Hawaiian, Inc. v. Amigos, Inc.,* 63 Haw. 485, 630 P.2d 1075 (1981); *Shinn v. Edwin Yee, Ltd.,* 57 Haw. 215, 553 P.2d 733 (1976); *Siko v. Seguirant, supra.*

George argues that because the 1968 Deed contained no covenant or condition of his promise to care for Mrs. Almeida, the evidence is not clear and convincing that there was no donative intent. The court below found that in consideration of the conveyance George promised Mrs. Almeida "that upon his retirement from the military service he would care for [her] needs for the remainder of her natural life." Finding of Fact No. 8. Mrs. Almeida, who was 78 years of age at the time of trial, testified unequivocally that George so promised. Her son Albert Almeida (Albert) testified that after 1968 George confirmed his promise to Mrs. Almeida to take care of her. George's testimony was that he made no such promise to his mother.

[8] We hold that (1) the trier of fact, the trial court in this case, resolved the conflicting evidence by finding the testimony of Mrs. Almeida and Albert to be credible and (2) as so resolved, *519 the evidence could reasonably produce in its mind a firm belief that George did make the promise in contention to Mrs. Almeida, and no gift was intended.

III.

George asserts that the trial court erred in finding and concluding that there was a "contract" enforceable by Mrs. Almeida. He argues that his alleged promise to "care for" Mrs. Almeida lacked reasonable certainty. We disagree.

Restatement (Second) of Contracts § 33 (1981) provides in relevant part:

(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

See Francone v. McClay, 41 Haw. 72 (1955); *Clarkin v. Reimann,* 2 Haw.App. 618, 638 P.2d 857 (1981).

[9] We have announced the policy that "the law leans against the destruction of contracts for uncertainty" and that "[c]ourts favor the determination that an agreement is sufficiently definite." *In re Sing Chong Co., Ltd.,* 1 Haw.App. 236, 239, 617 P.2d 578, 581 (1980).

[10] Professor Corbin states that an agreement "to support a person is not too indefinite" because a "court or jury can determine in each case what performance is reasonably necessary for support." 1 A. Corbin, Corbin on Contracts § 100, n. 56 (1963). An agreement to "care for" the grantor in a deed is broad enough to mean an obligation to provide support to him. *Walton v. Walton,* 113 Ga.App. 400, 148 S.E.2d 331 (1966). A written agreement in **180 the deed to provide "adequate care and maintenance of [the grantor] during the remainder of [her] lifetime" was not questioned as lacking reasonable certainty to preclude enforceability in *Anderson v. Anderson,* 620 S.W.2d

815, 817 (Tex.App.1981). *See also Fisher v. Sellers,* 214 Ark. 635, 217 S.W.2d 331 (1949); *Cook v. Adams,* 89 So.2d 6 (Fla.1956).

***520** Our supreme court has stated that "an undertaking and promise of the grantee to provide for the grantors a comfortable and suitable support and maintenance during the remainder of their respective lives," together with love and affection and one dollar, constitute good and sufficient consideration. *In re Kealiiahonui,* 9 Haw. 1, 7 (1893). George's promise to "care for" Mrs. Almeida was equivalent to a promise to support her.

[11] Thus, there was reasonable certainty and the trial court did not err in finding and concluding that George's promise to "care for" Mrs. Almeida constituted an enforceable agreement.

IV.

George claims that under the facts of the case, he should have prevailed on his affirmative defense of statute of limitations or laches. He argues that (1) his alleged agreement to care for Mrs. Almeida was made at or about the time of the execution of the 1968 Deed; (2) in 1970, Mrs. Almeida sought to have him convey his interest in the Property to her which he refused to do; (3) Mrs. Almeida filed her complaint on October 22, 1980; (4) she "had knowledge of the facts and circumstances to bring her claim" in 1970 (Opening Brief at 27); and (4) thus, her action commenced in 1980 was too late. George's claim is without merit.

[12] Mrs. Almeida's claim was based on a breach of an agreement. Generally, the statute of limitations does not begin to run on a contract until it is breached. *See Au v. Au,* 63 Haw. 210, 626 P.2d 173 (1981). Furthermore, in the absence of a repudiation, the limitations period does not begin to run until the agreement is to be performed. 51 Am.Jur.2d *Limitation of Actions* § 126 (1970).

[13] Here, George's promise was to take care of Mrs. Almeida after his retirement from military service. He retired in September 1980, although he had returned to Maui earlier in July 1980. His breach of the agreement occurred in September 1980 after his retirement. Furthermore, the record is devoid of any evidence that his refusal to reconvey his interest to Mrs. Almeida in 1970 was an anticipatory breach of his promise. The instant law suit was commenced in October 1980, only a ***521** short time after the six-year limitations period of HRS § 657-1 (1976 & Supp.1982) began running.

[14] Mrs. Almeida's quest for equitable relief subjects her to the defense of laches. The laches doctrine is based on the maxim that "equity aids the vigilant, not those who slumber on their rights." *Adair v. Hustace,* 64 Haw. 314, 320, 640 P.2d 294, 300 (1982) (quoting 2 S. Symons, *Pomeroy's Equity Jurisprudence* § 418 (5th ed. 1941)). Although "[a] court of equity is not bound by the statute of limitations, ... in the absence of extraordinary circumstances, it will usually grant or withhold relief in analogy to the statute of limitations relating to law actions of like character." *Yokochi v. Yoshimoto,* 44 Haw. 297, 300, 353 P.2d 820, 823 (1960).

[15] Mrs. Almeida commenced her action about a month after the analogous six-year limitations period began running. Since George has failed to show any extraordinary circumstance in the case, the doctrine of laches does not apply.

V.

Finally, George contends that the conclusion of law and judgment of the trial court divesting the joint interest of George in the Property and vesting it in Mrs. Almeida were erroneous for three reasons. First, since the 1968 Deed was absolute and unconditional, George's oral promise was a covenant rather than a condition subsequent, so the proper remedy was the award of damages and not divestiture. Second, inasmuch as Harry was a co-grantor in the 1968 Deed, the trial court could not vest in Mrs. Almeida the interest George acquired from Harry. Third, since the trial court concluded, in the alternative, that the parties ****181** may remain as joint tenants of the Property provided that (1) Mrs. Almeida shall have the beneficial use thereof until her death and (2) George shall pay her $250 per month commencing September 1, 1980 (Conclusion of Law No. 7), there was an adequate remedy at law. We do not agree.

A.

Citing *State v. Thom,* 58 Haw. 8, 563 P.2d 982 (1977), George contends that the 1968 Deed must be construed in ***522** accordance with the intention of the parties, as ascertained from the language of the deed. The 1968 Deed recites a consideration of one

dollar and love and affection and conveys the Property to Mrs. Almeida and George, as joint tenants, absolutely and unconditionally. Therefore, George argues that his oral promise to support Mrs. Almeida is not a condition of conveyance but a covenant. For a breach of such covenant, Mrs. Almeida is entitled only to a money judgment.

State v. Thom, supra, sets forth the general law regarding deeds of conveyance. However, the judicial treatment of deeds in consideration of support is unique and may be summarized as follows:

> Where a deed depends for its consideration upon a promise of support the courts have shown a great deal of leniency toward the grantor. Relief is granted in a variety of ways when the grantee does not fulfil his promise. The deed is sometimes treated as voidable at the option of the grantor, or the deed may be set aside for lack of consideration or the deed treated as conveying a fee upon a condition subsequent.

6 G. Thompson, *Real Property* § 3117, at 906-07 (1962). *See also* 26 C.J.S. *Deeds* § 21 (1956); 73 Am.Jur.2d *Support of Persons* §§ 26, 36, 40 (1974).

Courts have evinced their concern in this area and acted to grant equitable relief "particularly where the grantor is of advanced years." 26 C.J.S., *supra,* at 620. Upon the grantee's breach, courts have cancelled or voided a deed even where the promise to support was not specified in the deed itself but appeared in a separate writing, *Shook v. Bergstrasser,* 356 Pa. 167, 51 A.2d 681 (1947), or was orally made by the grantee. *Lewelling v. McElroy,* 148 Neb. 309, 27 N.W.2d 268 (1947); *Frasher v. Frasher,* 249 S.E.2d 513 (W.Va.1978); *Nadler v. Nadler,* 242 Wis. 537, 8 N.W.2d 306 (1943).

[16] Where the promise to support is deemed to be a condition subsequent, the courts have decreed rescission and cancellation or reconveyance upon breach of the promise. *Nadler v. Nadler, supra; Glocke v. Glocke,* 113 Wis. 303, 89 N.W. 118 (1902). However, the absence of a condition subsequent has not precluded a court from decreeing rescission and cancellation or other equitable remedies. Finding failure of consideration ***523** upon the grantee's breach, courts have cancelled the deed and restored the property to the grantor. *Cook v. Adams, supra; Lewelling v. McElroy, supra; Shook v. Bergstrasser, supra; Johnson v. Kiser,* 216 Va. 794, 223 S.E.2d 871 (1976); *Frasher v. Frasher, supra.* In some cases, the courts have utilized the remedy of constructive trust. *Loschen v. Clark,* 256 Iowa 413, 127 N.W.2d 600 (1964); *Dietz v. Dietz,* 244 Minn. 330, 70 N.W.2d 281 (1955).

[17] Here, Mrs. Almeida, who was of advanced age, had the Property conveyed to herself and George in consideration of George's oral promise to support her. George breached his agreement and Mrs. Almeida wanted the interest conveyed to George to be divested. Even assuming that George's promise to support was not a condition subsequent, there was a failure of consideration and, on the basis of the reported cases, the trial court had the authority and discretion to rescind and cancel the 1968 Deed.

B.

George then argues that the proper remedy was not the divestment of his interest and the vesting of it in Mrs. Almeida, but rescission and cancellation of the 1968 Deed. Further, since Harry was a co-grantor, but a non-party in the case, even rescission and cancellation would not have been proper. *See* part I, *supra.*

[18] In this case, Mrs. Almeida sought the aid of a court of equity. A "court of equity has plenary power to mold its decrees ****182** in such form as to conserve the equities of all parties * * *." *Fleming v. Napili Kai, Ltd.,* 50 Haw. 66, 70, 430 P.2d 316, 319 (1967) (quoting *Baker Sand & Gravel Co. v. Rogers P. & H. Co.,* 228 Ala. 612, 619, 154 So. 591, 597, 102 A.L.R. 346, 355 (1934)). *See Schrader v. Benton,* 2 Haw.App. 564, 635 P.2d 562 (1981). Also, "[t]he relief granted in equity is dictated by the equitable requirements of the situation, and must be adapted to the facts and circumstances of the particular case." *Shinn v. Edwin Yee, Ltd.,* 57 Haw. at 235, 553 P.2d at 746.

In Finding of Fact No. 7 which is unchallenged, the trial court found:

> 7. On March 19, 1965, Plaintiff conveyed Lot 12-B [the ***524** Property] from herself as sole owner to herself and her son Harry Almeida as joint tenants. This conveyance was undertaken in exchange for the promise of Harry Almeida that he would care

for Plaintiff for the remainder of her life, but it was not intended to pass any interest in the property to Harry until Plaintiff's death. Harry Almeida subsequently informed Plaintiff that he was not going to return to Maui.

The consideration for the March 19, 1965 conveyance of a joint interest to Harry was his promise to support Mrs. Almeida. Finding of Fact No. 7 indicates a breach of the promise by Harry since his decision not to return to Maui would make it impractical for him to care for Mrs. Almeida. Thus, Mrs. Almeida had the right to have Harry's interest in the Property restored to her consensually or by judicial action. She did neither. Instead, she caused Harry to convey the Property together with her to herself and George by the 1968 Deed.

[19] Under such circumstances, the trial court could and did mold its decree to divest George's interest in the Property and vest the same in Mrs. Almeida. It was unnecessary to require Harry to join in the law suit, decree the rescission and cancellation of the 1968 Deed and order Harry to convey his interest in the Property to Mrs. Almeida.

C.

In the Findings of Fact and Conclusions of Law filed on October 20, 1981, after concluding that a judgment should be entered divesting George's interest in the Property and vesting the same in Mrs. Almeida, the trial court, in the alternative, concluded that the Property should remain in the names of the parties as joint tenants provided that Mrs. Almeida would have the beneficial interest of the Property during her lifetime and that George would pay Mrs. Almeida $250 per month from September 1, 1981. George asserts that this clearly shows that Mrs. Almeida had an adequate remedy at law and the equitable remedy of divestiture was improper.

[20] At the hearing on George's motion for reconsideration of the judgment and for amendment of findings of fact and conclusions *525 of law, the trial judge indicated that he had inserted the alternative conclusion of law for a practical purpose. He stated that Mrs. Almeida was aged and had "passed her life expectancy" and he was giving George "a chance to make up with ... his mother." Transcript at 141. However, in his affidavit, George indicated that since his monthly net income totaled $1,700 and his monthly expenses approximated $1,615, he would be unable to make a monthly payment of $250 to Mrs. Almeida. Furthermore, Mrs. Almeida rejected the court's alternative conclusion. The court's efforts were in vain.

[21] As indicated in part V-A, *supra,* where there has been a failure of the consideration of support for a deed, the equitable remedy of rescission and cancellation is not uncommon, especially where the grantor is aged. A money judgment award to Mrs. Almeida, who was 78 years old, upon George's representation that he was unable to pay $250 monthly, would have been an inadequate remedy at law. The trial court did not err in ordering divestiture in the judgment.

Affirmed.

4 Haw.App. 513, 669 P.2d 174

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Missouri Court of Appeals, Southern District,
Division One.
Mary Jewell PORTER, Respondent,
v.
Max David PORTER, Appellant.
No. 12357.

July 21, 1982.

Former husband appealed from a judgment of the Circuit Court, Jasper County, Herbert Casteel, J., directing specific performance of portion of property settlement agreement entered into with former wife prior to their divorce. The Court of Appeals, Greene, C. J., held that provisions of agreement relating to furnishing of an automobile to former wife by former husband fell short of prescribed specificity standards for issuance of specific performance decree.

Affirmed in part, reversed and remanded in part.

West Headnotes

[1] Appeal and Error ⇐ 846(1)
30k846(1) Most Cited Cases

[1] Appeal and Error ⇐ 1010.1(6)
30k1010.1(6) Most Cited Cases

[1] Appeal and Error ⇐ 1012.1(1)
30k1012.1(1) Most Cited Cases
In a court-tried case, judgment should be sustained if it is supported by substantial evidence, is not against weight of the evidence, and is not based on an erroneous declaration or application of law.

[2] Specific Performance ⇐ 1
358k1 Most Cited Cases

[2] Specific Performance ⇐ 25
358k25 Most Cited Cases
An action in specific performance to compel performance of contract is an equitable remedy that presupposes a concluded contract, sufficiently definite and certain in its terms so as to leave no doubt that there had been a meeting of minds of parties on terms of contract so definite that promises and performance are reasonably certain, not in doubt, or subject to future ascertainment.

[3] Specific Performance ⇐ 28(1)
358k28(1) Most Cited Cases
A court of equity will not decree specific performance of a contract which is uncertain, incomplete, or indefinite in terms or intendments.

[4] Specific Performance ⇐ 29(1)
358k29(1) Most Cited Cases
Former wife was not entitled to specific performance of portion of property settlement agreement entered into with former husband prior to divorce, which provided that he furnish former wife a current model automobile or pay her reasonable rental expense thereof, because such provision did not specify make or model of automobile to be furnished, define term "current model," state whether former wife was to return car presently in her possession when delivered a "current model," or say whether an automobile was required to be provided each year, and therefore fell short of prescribed specificity standards for issuance of specific performance decree.

***397** Ronald C. Spradley, Spradley & Wirken, Kansas City, for respondent.

Ron Mitchell, Blanchard, Van Fleet, Martin, Robertson & Dermott, Joplin, for appellant.

GREENE, Chief Judge.

Max David Porter appeals from the trial court's judgment directing specific performance of a portion of a property settlement agreement that he had entered into with his wife, Mary Jewell Porter, prior to their divorce. The settlement agreement language in question provides that Max furnish Mary "a current model automobile, or pay to her the reasonable rental expense thereof."

Mary's action against Max was in two counts. Count I was an action in specific performance. It alleged that the parties had executed a property settlement agreement prior to their divorce in 1972; that the agreement was approved by the trial court at the time the divorce decree was entered; and, that since 1979, Max had failed and refused to perform that portion of the agreement wherein he promised to furnish her a current model automobile, or pay to her the reasonable rental expense thereof. Mary contended that she had no adequate remedy at law

since future damages could not be reasonably ascertained, and that she would have to bring multiple actions in the future, which would pose an unreasonable burden on all concerned. Count II was an action for damages which alleged Max had failed to perform that section of the agreement which required him to pay Mary an additional sum of $1,000 in each year he received a bonus of $5,000 or more from his employer.

In his counterclaim, Max requested modification of the settlement agreement, alleging that he had formerly been employed by Porter Cadillac-Buick; that the automobile agency had been sold; and, that he was now unemployed. Max prayed for termination of the alimony provisions of the agreement and decree, and asked to be relieved of any obligation to furnish Mary with an automobile. The trial court dismissed the counterclaim, evidently on the theory that the settlement agreement provisions were contractual rather than decretal, and, therefore, not subject to modification.

Max then filed an amended answer and counterclaim. In his answer, he alleged, among other things, that an obligation in the nature of alimony (furnishing the car) cannot be enforced by an action for specific performance, and that if the agreement to furnish an automobile was contractual, it was void and unenforceable because it was vague, indefinite, and ambiguous. The counterclaim alleged that, if the agreement was to be strictly construed, Max was entitled ***398** to a refund since he had paid Mary approximately $15,000 more than the property settlement required since the divorce.

After trial, the court entered judgment for Mary in her action for specific performance, denied her claim for damages, and denied Max relief on his counterclaim. The trial court ordered Max to furnish Mary with a current model automobile every year, commencing in 1981, with Mary to return the car she then had to Max, and that this practice should continue from year to year, unless Mary remarries. Max was given the option to pay Mary "the reasonable rental expense" for a current model automobile, rather than giving her a car each year.

(1) Since this was a court-tried case, the judgment should be sustained if it is supported by substantial evidence, is not against the weight of the evidence, and is not based on an erroneous declaration or application of law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Since the judgment is based on an erroneous declaration and application of law, it must be reversed.

The record shows that prior to the divorce of the parties, Max discussed a property settlement agreement with Mary and wrote down on a piece of paper, at her request, what he thought was a fair settlement. Mary took the paper to her attorney who drew the settlement agreement. Her attorney was a neighbor and family friend who Max thought was representing both parties in the divorce action. Max did not retain a separate attorney, but relied on Mary's attorney to prepare the property settlement agreement. Max never talked to Mary's attorney concerning the property settlement.

The agreement provided for the disposition of the real and personal property of the parties, custody and support of the two minor children of the parties, payment of debts, support for Mary, and miscellaneous provisions. The support provisions in paragraph 9 of the agreement provided that Max would pay Mary $350 a month as alimony, and furnish her a current model automobile, or pay to her the reasonable rental expense thereof. It also provided that in the event Max received an annual gross bonus of $5,000 or more that he would pay Mary an additional $1,000 in such year. The paragraph concluded with the statement that if Mary remarried, all obligations of Max to her, as set out in paragraph 9, would cease. Max and Mary signed the agreement.

At the time the property settlement agreement was entered into, Max was an employee of an automobile agency known as Porter Cadillac-Buick. As such, he could buy automobiles well below retail cost, use them for a year, and then sell them for approximately what he had paid. There is nothing in the record to show that either of them contemplated whether Max would be obligated to furnish Mary with a car if he left his employment with the automobile agency.

Mary obtained a default divorce. Max was not present in person or by attorney. The decree, dated March 1, 1972, contains the notations "settlement agreement filed and approved" and "defendant ordered to pay plaintiff as child support and alimony the sum as set out in property settlement."

After the divorce, and until the fall of 1979, Max furnished Mary with a new or demonstrator Buick automobile every year when the models changed, taking back the car that Mary was driving. Through his position with the car agency, this practice cost him little, if any, money. He paid his alimony and child support, paid medical and dental expenses for the children, paid for gasoline and insurance for the car and gave Mary additional money over and above what he had obligated to do. In early 1980, the automobile agency was sold and Max's employment there was terminated. Since he was unemployed and unable to buy and sell automobiles at the prices he previously could, Max advised Mary that he could no longer furnish her with a new car every year, but offered to give her the title to the 1979 Buick she was driving. Mary refused, and brought suit.

***399** (2)(3) An action in specific performance to compel performance of a contract is an equitable remedy that presupposes a concluded contract, sufficiently definite and certain in its terms so as to leave no doubt that there had been a meeting of the minds of the parties on the terms of the contract so definite that promises and performance are reasonably certain, not in doubt, or subject to future ascertainment. McKenna v. McKenna, 607 S.W.2d 464, 467 (Mo.App.1980). A court of equity will not decree specific performance of a contract which is uncertain, incomplete, or indefinite in terms or intendments. Ellison v. Wood Garment Company, 286 S.W.2d 27, 30-31 (Mo.App.1956).

(4) The support provisions of the settlement agreement which relate to the furnishing of an automobile fall short of the prescribed standards for the issuance of a specific performance decree. They do not specify the make or model of the automobile to be furnished. While they do say current model, they do not define that term. The provisions do not state whether Mary is to return the car presently in her possession when Max delivers a "current model" to her, or when the automobile is to be delivered to Mary. Furthermore, the agreement does not say whether an automobile must be provided each and every year, or requires only a one-time delivery of a "current model" automobile. As to the term "reasonable rental value" in lieu of furnishing an automobile, the agreement does not say how such value would be computed, or when it was to be paid.

Due to the lack of specificity, the support provisions of the agreement which relate to the furnishing of an automobile are uncertain, incomplete, and indefinite in terms and intendments to such a decree as to make them void and unenforceable. Another defect is that enforcement of the specific performance decree would require continual supervision of the court in an effort to resolve some of the questions raised above. In such cases, specific performance will not lie. Engemoen v. Rea, 26 F.2d 576 (8th Cir.), cert. denied, 278 U.S. 627, 49 S.Ct. 28, 73 L.Ed. 546 (1928).

For the reasons stated, the trial court's judgment is reversed and the cause is remanded with directions that the trial court enter judgment for defendant, Max Porter, on Count I of plaintiff's petition. In all other respects, the trial court's judgment is affirmed.

All concur.

637 S.W.2d 396

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be controlling. In that case the supreme court held that where the lease so provided, the lessor could terminate the lease upon default by simply giving the lessee notice thereof. The court observed:

> A lease may be terminated either by statutory landlord and tenant proceedings or by compliance with stipulations incorporated in the written lease by the parties themselves. In this instance the lessor followed the latter procedure and was entitled to do so.

84 So.2d at 328. In the instant case, however, the lease did not contain such a provision. Moreover, Hiett did not purport to terminate the lease by giving notice to the Clarks but rather elected to pursue the statutory landlord and tenant proceedings. *6701 Realty* was a suit in circuit court, so the question of whether the lessor was required to give notice under section 83.-20(2) was irrelevant.

[1] There is authority for the proposition that the three-day notice provided in section 83.20(2) can be expressly waived in the lease. *Moskos v. Hand*, 247 So.2d 795 (Fla. 4th DCA 1971). However, there is nothing in the instant lease which either expressly or impliedly waives the necessity of this notice. The requirement of paragraph 4 to give written notice of any default other than the payment of rent is to alert the lessee to the nature of his failure of performance before putting him in default. Subsection (c) simply gives the lessor the option to institute a suit to terminate the lease. This provision has nothing to do with the waiver of the statutory notice.

[2] By having brought suit for eviction in county court, Hiett became bound by the statutory provisions applicable to that proceeding. The three-day notice under section 83.20(2) was a condition precedent to relief. Since Hiett failed to give the three-day notice, the county court properly entered judgment against him. The circuit court departed from the essential requirements of law in holding otherwise.

We grant the petition for certiorari and direct that the circuit court affirm the judgment of the county court.

SCHEB and SCHOONOVER, JJ., concur.

Antoinette L. BELITZ, Trustee, Appellant,

v.

Bernard Frank RIEBE and Joyce Riebe, his wife, Appellees.

No. 85-1526.

District Court of Appeal of Florida, Fifth District.

Sept. 11, 1986.

Rehearing Denied Oct. 6, 1986.

Buyers of real property held in trust filed suit against trustee to obtain specific performance of land sale contract. The Circuit Court, Lake County, Ernest C. Aulls, Jr., J., reformed contract to include deed restrictions that were initially proposed and entered judgment of specific performance of contract as reformed. Trustee appealed. The District Court of Appeal, Upchurch, C.J., held that deed restrictions were material to agreement and trial court could not order specific performance in absence of agreement as to those provisions.

Reversed.

1. Reformation of Instruments ⇐20

While court may reform contract if it fails to express parties' intentions because of fraud, mutual mistake, accident, or inequitable conduct, it has no right to write contract for parties where none exists.

2. Reformation of Instruments ⇐47

Circuit court could not order specific performance of land sale contract as reformed to include originally proposed deed restrictions, notwithstanding that party's submission of subsequent deed restrictions was bad-faith attempt to avoid that agreement; deed restrictions were material part of proposed contract, which could not exist until they were agreed upon.

Marvin L. Beaman, Jr., of Marvin L. Beaman, Jr., P.A., Winter Park, for appellant.

William H. Morrison, of William H. Morrison, P.A., Altamonte Springs, for appellees.

UPCHURCH, Chief Judge.

This is an appeal from a judgment for specific performance of a land sale contract. The basic question presented is whether there was a contract which the court could enforce.

Appellant Belitz was trustee of real property in Lake County. The trust beneficiaries were four family members of Belitz and two non-family members, one an attorney and the other a Realtor.

After Belitz negotiated and exchanged several offers and counter offers with appellees Bernard and Joyce Riebe, the agreement in question was accepted. The agreement included the following provision: "Subject to buyer and seller agreeing on deed restrictions provided that none of the foregoing shall prevent use of the property for the purpose of building single family house" (underlined portion handwritten). No specific list of restrictions was discussed, although the parties met and generally discussed some restrictions.

The trust beneficiaries were not pleased with the agreement because the price was significantly lower than the appraised value. On July 8, 1983, a meeting was called by Belitz during which the Riebes were asked if they would just drop the contract. At this meeting, the agents for Belitz presented the Riebes with a set of proposed deed restrictions. These restrictions, according to Mrs. Riebe, were acceptable with a few modifications. The modifications were not acceptable to Belitz and a new list was prepared. Altogether three sets of restrictions were proposed, each set becoming more severe and the negotiations ended.

The Riebes filed suit to obtain specific performance, damages and reformation of the contract, to set usual and customary deed restrictions, or, in the alternative, to reform the contract by deletion of the requirement of deed restrictions. The trial court entered final judgment reforming the contract to provide that the deed restrictions were the same restrictions as first submitted by Belitz and modified by the Riebes. The final judgment also provided that the contract as reformed was to be specifically performed.

Belitz contends that there was no meeting of the minds as to the deed restrictions and that the lack of these essential terms renders the contract indefinite, uncertain and incapable of specific performance. *See Farrell v. Phillips*, 414 So.2d 1119 (Fla. 4th DCA 1982); *Brickell Townhouse, Inc. v. Hirschfield*, 404 So.2d 153 (Fla. 3d DCA 1981), *rev. denied*, 412 So.2d 466 (Fla.1982). Belitz concludes that a court has no power to supply an agreement which was never made nor to supply material terms or provisions omitted by the parties.

[1, 2] The Riebes argue that equity has power to reform instruments to prevent manifest injustice and to express the intent of the parties. *Spear v. McDonald*, 67 So.2d 630 (Fla.1953); *Nielsen v. Paneil, Inc.*, 202 So.2d 894 (Fla. 4th DCA 1967). A court will reform a contract if it fails to express the parties' intentions because of fraud, mutual mistake, accident or inequitable conduct. *Malt v. R.J. Mueller Enterprises, Inc.*, 396 So.2d 1174 (Fla. 4th DCA 1981); *Hardaway Timber Co. v. Hansford*, 245 So.2d 911 (Fla. 1st DCA 1971); 9 Fla.Jur.2d *Cancellation, Reformation and Rescission of Instruments*, § 72.

The Riebes argue that by failing to negotiate in good faith over the deed restrictions, Belitz acted inequitably. The Riebes point out that where the cooperation of a

party is a prerequisite to performance under the contract, there is an implied promise that the party will give the necessary cooperation. *Casale v. Carrigan and Boland, Inc.*, 288 So.2d 299 (Fla. 4th DCA), *cert. dism*, 301 So.2d 100 (Fla.1974). *See also Hanover Realty Corp. v. Condomo*, 95 So.2d 420 (Fla.1957); *Sharp v. Williams*, 141 Fla. 1, 192 So. 476 (1939). There is little doubt that after submission of the initial list of restrictions, which the Riebes did not accept, Belitz made no attempt to negotiate further in good faith. The subsequent lists were transparent attempts to avoid the agreement.

However, a court has no right to write a contract for parties where none exists. We conclude that the deed restrictions were a material part of the proposed agreement. Until they were agreed upon no contract existed and the court could not supply them for the parties. Ordinarily deed restrictions are dictated by the seller and the buyer is free to accept or reject them. Until there is an acceptance, there can be no contract. This proposed agreement was nothing more than an "agreement to agree" and could not be enforced.

REVERSED.

COBB and COWART, JJ., concur.

Geraldine Lavern AUSTIN and Phyllis Lowery, Appellants,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Appellee.

No. BM-132.

District Court of Appeal of Florida, First District.

Sept. 16, 1986.

Rehearing Denied Oct. 29, 1986.

Rule proposed by Department of Health and Rehabilitative Services, requiring that applicants for public assistance cooperate with child support enforcement unit in identifying, locating and establishing paternity of parents of children for whom public assistance is received, including requirement that parent cooperate by assisting in establishing paternity of child born out of wedlock, was challenged as invalid exercise of delegated legislative authority. The validity of the rule was upheld by hearing officer of the Division of Administrative Hearing. On appeal, the District Court of Appeal, Ervin, J., held that rule defining noncooperation to include situations in which mother identifies one or more men as putative fathers, but scientific tests indicate that none of men identified could in fact have been father of child, did not overrule prior District Court of Appeal decision invalidating policy used by Department to sanction welfare mothers who failed to cooperate in identifying fathers of their children.

Affirmed.

Social Security and Public Welfare
⇐194.11

Proposed rule of Department of Health and Rehabilitative Services requiring parent applying for public assistance to cooperate by assisting in establishing paternity of child born out of wedlock, and defining noncooperation to include situations in which mother identifies one or more men as putative fathers, but scientific tests indicate that none of men identified could in fact have been father of child, did not create irrebuttable presumptions from negative test results that man was not child's father and that mother had refused to cooperate, in violation of prior case law, given requirements of fair hearing and discretion of public assistance unit. West's F.S.A. § 409.2572; Social Security Act, § 402(a)(26)(B), as amended, 42 U.S.C.A. § 602(a)(26)(B).

Sarah H. Bohr, Jacksonville Area Legal Aid, Inc., Jacksonville, Melanie Malherbe,

cell, 296 N.C. 728, 252 S.E.2d 772 (1979), we have some doubt as to whether the former question was sufficiently specific. (In *Purcell*, the court held improper the questioning of the defendant as to whether he had "ever killed anybody.") Even if this question was improper, however, we do not find it to have been a prejudicial error. In view of the evidence of defendant's guilt we do not believe that this one question about an unrelated event could have influenced the jury's verdict, and we find no prejudical error.

[4] Defendant attacks the statute under which he was charged as unconstitutionally vague, and therefore void. We have previously found that G.S. 14-202.1 is not void for vagueness, *State v. Vehaun*, 34 N.C. App. 700, 239 S.E.2d 705 (1977), *cert. denied* 294 N.C. 445, 241 S.E.2d 846 (1978), and that decision is the correct one. Defendant argues that our opinion in *Vehaun* did not address the standard set out in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), and *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), that to avoid being unconstitutionally vague a statute must provide standards to guide those who enforce the law. We do not find, however, that G.S. 14-202.1(a)(1) is unconstitutional on this basis, and we note that this statute is much more specific than the ordinance which was held unconstitutional in *Goguen*. Defendant's argument as to unconstitutionality is without merit.

[5, 6] We find no merit in defendant's fourth argument, which is addressed to the trial court's restriction of his questioning of potential jurors. Regulation of the inquiry on voir dire rests in the court's discretion, and in order to show reversible error in the exercise of that discretion defendant must show both prejudice and a clear abuse of discretion. *State v. Young*, 287 N.C. 377, 214 S.E.2d 763 (1975), *death penalty vacated*, 428 U.S. 903, 96 S.Ct. 3207, 49 L.Ed.2d 1208 (1976). Neither of these appears in this case.

[7, 8] Finally, defendant argues that the trial court erred in failing to charge the jury that they must find as an essential element of the crime that defendant *willfully* took indecent liberties with the child. Defendant is correct that G.S. 14-202.-1(a)(1) requires that the taking of indecent liberties be willful, and the court should have charged on willfulness as an element. (North Carolina Pattern Jury Instruction—Criminal 226.85, upon which the court appears to have relied, inadvertently omits this element.) However, in this case all the evidence shows that if defendant took indecent liberties with the child he did so willfully, that is, purposely and without justification or excuse. *See State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473 (1965). In fact, we cannot imagine a situation in which the taking of indecent liberties for the purpose of arousing or gratifying sexual desire could be other than willful, and we fail to see what the element of willfulness adds to this statutory crime. This is a very different situation from that of abandonment and nonsupport addressed in *State v. Yelverton*, 196 N.C. 64, 144 S.E. 534 (1928), upon which defendant relies. We hold that in this case the jury by finding that defendant committed the crime necessarily found that he acted willfully, and accordingly the omission in the charge was harmless beyond a reasonable doubt.

No error.

ERWIN and HILL, JJ., concur.

Quentin GREGORY, Jr.

v.

PERDUE, INCORPORATED.

No. 796SC998.

Court of Appeals of North Carolina.

July 15, 1980.

Action was brought to recover damages for breach of contract to grow chickens.

The Superior Court, Halifax County, J. Herbert Small, J., granted defendant's motion for summary judgment and plaintiff appealed. The Court of Appeals, Wells, J., held that there was no contract to grow chickens, where plaintiff and defendant never reached a mutual understanding as to how many chickens plaintiff would grow, the time or times they would be delivered by defendant to plaintiff for growing or delivered by plaintiff to defendant after growing, or the compensation to be paid by defendant to plaintiff.

Affirmed.

1. Judgment ⇐185(2, 6)

Burden on party moving for summary judgment is to establish that there is no genuine issue as to any material fact remaining to be determined and such burden may be carried by proving that an essential element of opposing party's claim is nonexistent or by showing through discovery that opposing party cannot produce enough evidence to support an essential element of his claim. Rules of Civil Procedure, Rule 56(c), G.S. § 1A–1.

2. Judgment ⇐178

Purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Rules of Civil Procedure, Rule 56(c), G.S. § 1A–1.

3. Contracts ⇐25

Acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation.

4. Contracts ⇐25

An offer to enter into a contract in the future must, to be binding, specify all the essential and material terms and leave nothing to be agreed upon as a result of future negotiations.

5. Contracts ⇐15

To constitute a valid contract, the parties must assert the same thing in the same sense, and their minds must meet as to all terms; if any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.

6. Contracts ⇐9(1, 3)

There was no contract to grow chickens, where plaintiff and defendant never reached a mutual understanding as to how many chickens plaintiff would grow, time or times they would be delivered by defendant to plaintiff for growing or delivered by plaintiff to defendant after growing, or compensation to be paid by defendant to plaintiff.

This action was brought to recover damages for breach of contract. In his verified complaint, plaintiff alleged that in December 1976, he began dismantling and remodeling six of his chicken houses at the instruction of defendant and in reliance on defendant's promise that plaintiff would receive a contract to grow chickens for defendant in the houses. In reliance on defendant's promises, plaintiff made physical changes in the houses and applied for a $50,000 loan to remodel them. In June 1977, defendant promised plaintiff a contract for the six houses in return for which plaintiff promised that all six houses would be operational by 1 January 1978. As a condition precedent to the contract, defendant insisted that plaintiff hire a man capable of supervising the six houses, which plaintiff did at considerable expense. Defendant guaranteed plaintiff $10,000 per house per year net income on the contract. Defendant instructed plaintiff to borrow $85,000 in additional funds, and defendant agreed to escrow profits to repay this loan. In October 1977, defendant cancelled all contractual relationships with plaintiff, causing plaintiff to sustain damages in the sum of $125,000.

Defendant filed an unverified answer in which it denied the essential allegations of

the complaint and asserted as a further defense that the only agreement between defendant and plaintiff was for plaintiff to grow chickens for defendant in one house on a flock to flock basis. Defendant alleged that plaintiff's poor management and growing practices caused it to withdraw from this arrangement.

The cause came on for hearing before Judge Small on defendant's motion for summary judgment. In support of its motion, defendant offered the affidavit of its employee, Gerald Jackson, and the deposition of plaintiff. Following the hearing, the trial judge entered summary judgment for defendant, from which plaintiff appeals.

Allsbrook, Benton, Knott, Cranford & Whitaker by William O. White, Jr., Roanoke Rapids, for plaintiff-appellant.

Pritchett, Cooke & Burch by Stephen R. Burch and Jonas M. Yates, Windsor, for defendant-appellee.

WELLS, Judge.

[1, 2] On motion for summary judgment, the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. G.S. 1A–1, Rule 56(c); *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972). The burden upon the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972). This burden may be carried by a movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce enough evidence to support an essential element of his claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Moore v. Fieldcrest Mills, Inc., supra; Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

[3–6] We now determine the propriety of summary judgment for defendant in this case by applying these principles to the record before us. The forecast of plaintiff's evidence must be gleaned from his verified complaint and his deposition, as he submitted no other papers in opposition to defendant's motion. Considered in the light most favorable to him, plaintiff, in both his verified complaint and deposition, at most alleges an agreement by him to grow an unspecified quantity of chickens for defendant in the future under certain quality conditions in return for which defendant agreed to guarantee plaintiff a stated minimum profit and to aid him in remodeling his chicken houses. Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation. *Construction Co. v. Housing Authority*, 1 N.C.App. 181, 160 S.E.2d 542 (1968). An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations. *Smith v. House of Kenton Corp.*, 23 N.C.App. 439, 209 S.E.2d 397 (1974), *cert. denied*, 286 N.C. 337, 211 S.E.2d 213 (1974). To constitute a valid contract, the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement. *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974).

From plaintiff's deposition, it is manifestly clear that plaintiff and defendant never reached a mutual understanding as to how many chickens plaintiff would grow, the time or times they would be delivered by defendant to plaintiff for growing or deliv-

ered by plaintiff to defendant after growing, or the compensation to be paid by defendant to plaintiff. There simply was no meeting of the minds. Under these circumstances, summary judgment was properly entered and the judgment of the trial court must be

Affirmed.

MORRIS, C. J., and PARKER, J., concur.

Carlton L. HASKINS, Jr., by Guardian ad litem, Carlton L. HASKINS, Sr.

v.

CAROLINA POWER AND LIGHT COMPANY.

No. 7911SC397.

Court of Appeals of North Carolina.

July 15, 1980.

Minor plaintiff, by his guardian ad litem, brought action for personal injuries sustained as a result of an accident which occurred when minor drove his motorbike into steel cable which was stretched across roadway owned by defendant utility. The Superior Court, Harnett County, Donald L. Smith, J., granted defendant's motion for summary judgment, and plaintiff appealed. The Court of Appeals, Webb, J., held that where minor plaintiff, a 15-year-old boy, drove his motorbike, which did not have a headlight, after dark on utility's private roadway, minor plaintiff was contributorily negligent and could not recover for his personal injuries sustained in the accident.

Affirmed.

Automobiles ⇐223(7)

Where minor plaintiff, a 15-year-old boy, rode his motorbike without headlight after dark on utility's private roadway, minor plaintiff was contributorily negligent and was precluded from recovering against utility for personal injuries sustained when he drove his motorbike into steel cable which utility had placed across roadway.

The minor plaintiff, by his guardian ad litem, instituted this action for personal injuries as the result of an accident which occurred on a roadway owned by the defendant. The minor plaintiff drove his motorbike into a steel cable which was stretched across the roadway. Defendant made a motion for summary judgment, contending that plaintiff was contributorily negligent as a matter of law. The papers filed in support and in opposition to the motion for summary judgment established the following facts. On 22 April 1977 between 9:00 and 9:30 p. m., plaintiff, a 15-year-old boy, drove his motorbike onto the defendant's private roadway. The roadway was unpaved and led to the defendant's substation near Erwin. The motorbike did not have a headlight. Plaintiff was very familiar with the roadway, having operated his motorbike on it "hundreds of times" over a period of several years. Plaintiff had not been on the roadway for approximately two weeks. Approximately three days prior to 22 April 1977, defendant had installed a steel cable across the roadway. The operator of the substation testified by affidavit that the cable was put up each night to prevent vandalism and was in place approximately three feet above the roadway when he left the premises at approximately 5:00 p. m. on 22 April 1977. He also stated in his affidavit that "[a]ttached to the cable was a metal red and white sign with the word 'Danger' on it, a red flag such as used to mark the end of power poles when they are transported by trailer, and a piece of orange surveyor's ribbon or tape." Plaintiff drove his motorbike into this cable and was injured. Plaintiff stated that when he looked at the cable after the accident, he saw only a small "danger" sign on the cable.

121 Cal.App.2d 71

BURGESS v. RODOM et al.

Civ. 19412.

District Court of Appeal, Second District, Division 2, California.
Nov. 4, 1953.

Action was brought to recover damages for breach of written contract to purchase realty. The Superior Court of Santa Barbara County, Atwell Westwick, J., entered judgment adverse to vendor, and vendor appealed. The District Court of Appeal, Fox, J., held that contract was unenforceable because incomplete with respect to terms on which balance of purchase price was to be paid.

Judgment affirmed.

1. Vendor and Purchaser ⇐21

Action for damages for breach of contract for purchase or sale of realty will not lie unless writing contains essential terms and material elements of agreement without recourse to parol evidence of intention of contracting parties.

2. Vendor and Purchaser ⇐1

The law does not provide a remedy for breach of an agreement to agree in future for sale of realty, and court may not speculate on what parties will agree.

3. Vendor and Purchaser ⇐21

It is indispensable to a valid memorandum of an agreement to sell and convey realty, that memorandum be complete evidence of terms to which parties have assented.

4. Vendor and Purchaser ⇐21

If memorandum of agreement to sell realty establishes that there was in fact no contract, or if it discloses that on essential and material terms, minds of parties did not meet and that such terms were left open for future settlement, then there is no binding obligation on either vendor or purchaser.

5. Vendor and Purchaser ⇐21

Written agreement of vendor and purchaser acknowledging receipt of $200 by vendor as a deposit on purchaser's price and providing that $5,000 balance should be paid within 30 days and that terms of payment should be made as soon as new purchaser arranged for new mortgage presently held by bank was not binding on either vendor or purchaser because incomplete as to terms on which balance of purchase price was to be paid.

6. Vendor and Purchaser ⇐46

All provisions of deposit receipt relating to payment of purchase price of realty and terms should be read together.

7. Vendor and Purchaser ⇐49

In case of inconsistency between printed provisions of deposit receipt given in connection with sale of realty, and handwritten portion of receipt, handwritten portion would take preference over printed part. Code Civ.Proc. § 1862; Civ.Code, § 1651.

8. Evidence ⇐442(6)

In action to recover damages for breach of written contract to purchase realty, testimony was not admissible to establish terms, which were incomplete in written contract, and on which balance of purchase price was to be paid.

Elizabeth H. McCarthy, Los Angeles, for appellant.

Arden T. Jensen, Salvany, for respondent.

FOX, Justice.

Plaintiff seeks to recover damages for breach of contract to purchase real property. The demurrer of the defendant-vendee, Jane E. Rodom, to plaintiff's second amended complaint was sustained. Plaintiff declined to amend further. Judgment was accordingly entered that plaintiff take nothing. It is from this judgment that plaintiff appeals.

The agreement upon which the seller predicates his right of action acknowledges receipt of $200 as a deposit on the purchase price of the property and provides that "The balance of the purchase price [$5,000.] is to be paid within *30* days from date hereof, as follows, to-wit: *Terms to be made as soon as new purchaser arranges*

for new mortgage now held by Santa Ynez Valley Bank to Burgess (the seller)." The italicized portion of the agreement was inserted by handwriting in the blanks in a "deposit receipt" (California Real Estate Association Standard Form), which was signed by the plaintiff and defendant Jane E. Rodom but not signed by her husband, George.

Respondent contends that the agreement is lacking in essential elements and is fatally uncertain. Hence no cause of action is stated. Her position is well founded.

[1–4] An action for damages for breach of contract for the purchase or sale of real property will not lie unless the writing contains the essential terms and material elements of such an agreement without recourse to parol evidence of the intention of the contracting parties. Salomon v. Cooper, 98 Cal.App.2d 521, 522–523, 220 P.2d 774; Dillingham v. Dahlgren, 52 Cal. App. 322, 326–327, 198 P. 832. The law does not provide a remedy for breach of an agreement to agree in the future, and the court may not speculate upon what the parties will agree. Autry v. Republic Productions, Inc., 30 Cal.2d 144, 151, 152, 180 P.2d 888; Vangel v. Vangel, 116 Cal.App. 2d 615, 631, 254 P.2d 919. Hence, as pointed out in Salomon v. Cooper, supra, 98 Cal. App.2d page 523, 220 P.2d page 775: "It is indispensable to a valid memorandum of an agreement to sell and convey land that it be complete evidence of the terms to which the parties have assented. If it establishes that there was in fact no contract, if it discloses that upon essential and material terms the minds of the parties did not meet and that such terms were left open for future settlement, then there is no binding obligation upon the seller to convey or the buyer to accept and pay for the land. It will be regarded as merely an inchoate effort. Implications will not be indulged. [Citations.]"

[5] Applying these principles, it is clear that the deposit receipt is incomplete in one essential feature, viz., the terms upon which the balance of the purchase price is to be paid. The deposit of $200 represents only approximately four percent of the purchase price. It appears to have been contemplated that the remaining 96 percent would be partially financed through a new mortgage at the bank and some other arrangements made for paying or securing the balance. Hence, the handwritten insertion of the provision: "Terms to be made as soon as new purchaser arranges for new mortgage now held" by the bank. How this balance would be paid, whether in monthly, quarterly, semi-annual or annual installments, or at the end of a specified term of years does not appear. Likewise, absent is the rate of interest. The security, if any, to be provided for this balance, whatever it might be, is not specified. These are all important items, yet agreement with respect to each of them was "left open for future settlement." It is therefore established from the language which the parties painstakingly wrote into the blank space in the deposit receipt that their minds had not met upon these essential and material terms of the deal. They had simply agreed to agree upon terms in the future. In such circumstances there was no binding obligation upon the buyer to accept and pay for the land. Salomon v. Cooper, supra; Dillingham v. Dahlgren, supra; Wineburgh v. Gay, 27 Cal.App. 603, 605, 150 P. 1003.

The decision in Kline v. Rogerson, 80 Cal.App.2d 158, 181 P.2d 385, is particularly pertinent here. It is stated in 80 Cal. App.2d on page 160, 181 P.2d on page 387 that "The deposit receipt signed by defendant did not constitute an agreement of purchase and sale by the parties since it expressly provided that the balance of the purchase price was to be paid 'at $5,000 or more per year, plus interest at 5% or terms *to mutual satisfaction*'. Since the parties never agreed upon terms which were mutually satisfactory, there was never an agreement of purchase and sale."

[6,7] Plaintiff suggests that the contract calls for payment in cash in 30 days. He would treat as surplusage the handwritten addition. This, of course, he is not at liberty to do. Not only must all the provisions of the deposit receipt relating to payment and terms be read together, but in case of inconsistency the handwritten portion takes precedence over the printed

part. Code Civ.Proc. § 1862; Civ.Code, § 1651; Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 561, 147 P.2d 84.

[8] Plaintiff offers to supply the absent elements of an enforceable agreement by proving that respondent arranged for a loan at the bank for $2,200; that she had more than $2,800 in her account (but not in the escrow) at the bank; and that she moved into the property, remaining for about three weeks and moving out because of alleged misrepresentations relative to its construction. Such proof would be *aliunde* the writing and is not admissible for the purpose of establishing an essential and material feature of the abortive agreement. Salomon v. Cooper, supra; Dillingham v. Dahlgren, supra; Wineburgh v. Gay, supra.

In view of our conclusion that no cause of action is stated it becomes unnecessary to consider other questions raised by counsel.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

120 Cal.App.2d 811

In re THATCHER'S ESTATE.

THATCHER v. KUCHEL, Controller.

Civ. 19616.

District Court of Appeal, Second District, Division 2, California.

Oct. 26, 1953.

Petition to recover proceeds of escheated property. The Superior Court, Los Angeles County, Stanley N. Barnes, J., entered judgment of dismissal, predicated upon ground that action had not been brought to trial within five years after date of filing thereof, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that where attorney for state, after expiration of five-year period entered into stipulation permitting trial of action, action would not be dismissed because of passing of five-year period.

Order of dismissal reversed.

1. Dismissal and Nonsuit ⇐60(6)

Trial court is not deprived of jurisdiction of action by mere lapse of five-year period from time of filing, where parties enter into stipulation permitting trial of action prior to actual order of dismissal. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇐60(6)

Where attorney for state, after expiration of five-year period from date of filing action to recover proceeds of escheated property, entered into stipulation permitting trial of action, action would not be dismissed because of passing of five-year period. Code Civ.Proc. § 583.

3. Attorney General ⇐6

In action to recover proceeds of escheated property, Attorney General had authority to waive dismissal provision of statute requiring actions to be brought to trial within five years from date plaintiff filed action. Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(1)

Provisions of statute requiring action to be brought to trial within five years after plaintiff has filed action are merely procedural. Code Civ.Proc. § 583.

5. States ⇐190

When state enters court as litigant, it is bound by general rule of practice and procedure established for proper functioning of courts in discharge of their duties, same as any other litigant.

6. Dismissal and Nonsuit ⇐60(1)

Statute providing for dismissal of actions for failure to bring action to trial within five years of date plaintiff filed action is applicable to action where state is party. Code Civ.Proc. § 583.

7. States ⇐119

Where state through Assistant Attorney General entered into stipulation permitting trial of action to recover proceeds of escheated property after expiration of

MACHESKY v. CITY OF MILWAUKEE.

Supreme Court of Wisconsin.
March 6, 1934.

1. Contracts ⇐9(1).

Terms of offer must be so definite, or require such definite terms in acceptance, that promises and performances are reasonably certain.

2. Vendor and purchaser ⇐18(1).

Vendor could not recover for breach of contract giving vendor first option to repurchase; there being no meeting of minds as to price.

Appeal from a judgment of the Circuit Court for Milwaukee County; Gustav G. Gehrz, Circuit Judge.

Action by Anton Machesky against the City of Milwaukee. From a judgment on a directed verdict for defendant, plaintiff appeals.—[By Editorial Staff.]

Affirmed.

Action for damages for breach of contract. Defendant denied liability. At the conclusion of a trial upon the merits, the court directed a verdict for the defendant, and judgment was entered dismissing the action. Plaintiff appealed.

Theodore Kramer, of Milwaukee (Jacob S. Rothstein, of Milwaukee, of counsel), for appellant.

Max Raskin, City Atty., and H. A. Kovenock, Asst. City Atty., both of Milwaukee, for respondent.

FRITZ, Justice.

[1, 2] Plaintiff sued to recover damages for breach of contract. Plaintiff, in writing, offered to sell to the defendant certain land with the buildings thereon. In that offer there was the following provision: "I hereby reserve the right of first option to repurchase the said buildings herein offered at such time as the City of Milwaukee shall dispose of same." Defendants duly accepted that offer. The land and buildings were duly conveyed to defendant, and plaintiff was paid therefor in accordance with the terms of the offer. However, after plaintiff had delivered possession of the premises to defendant, he failed to inform defendant that he elected to exercise the option to repurchase until after the defendant, without notice to plaintiff, had sold the buildings to another person. Defendant contends that the agreement for option falls short of being an enforceable contract because it lacks the requisite definiteness and certainty, in that it leaves the amount of the price to be fixed by later agreement between the parties. In respect to that contention it must be noted that we are here concerned with an unperformed executory agreement, and not with a claim for reasonable compensation for property delivered or services performed. It is elementary that "an offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain." Restatement of the Law, Contracts, § 32.

As is stated in a footnote in 32 L. R. A. (N. S.) 430: "While the authorities are not in harmony on the question, by the weight of authority an order or contract for the purchase of personal property is lacking in an essential element, and is invalid, if the price to be paid is not expressly or impliedly incorporated therein, or some reasonably definite method for determining it agreed upon. Indeed, in most of the cases, considering the matter, the doctrine is stated that the price must be expressly stated, or some method expressly agreed upon by which it may be determined, in order to constitute a valid executory contract of sale." Harper v. Dougherty, 2 Cranch, C. C. 284, Fed. Cas. No. 6,087; Lewis v. Lofley, 60 Ga. 559; James v. Muir, 33 Mich. 224; Lambert v. Hays, 136 App. Div. 574, 121 N. Y. S. 80; Still v. Cannon, 13 Okl. 491, 75 P. 284; Wittkowsky v. Wasson, 71 N. C. 451; Scott v. Wells, 6 Watts & S. 357, 40 Am. Dec. 568; Bigley v. Risher, 63 Pa. 152, 13 Morr. Min. Rep. 176; Asebal v. Levy, 10 Bing. 376, 4 Moore & S. 217, 3 L. J. C. P. N. S. 93.

Appellant's supplemental brief relies upon the decision in Bowser & Co. v. Marks, 96 Ark. 113, 131 S. W. 334, 32 L. R. A. (N. S.) 429, Ann. Cas. 1912B, 357. However, as is stated in the opinion in that case, the property, for which the vendor was seeking to recover the reasonable value, had been delivered by the vendor to a common carrier, pursuant to the vendees' order, so that the title thereto had passed to the latter. Consequently, in that case, as well as in the other cases cited in that opinion, and all of the others relied upon by appellant, the contract had been executed by the delivery of the property, or the performance of the services contracted for.

In Fogg v. Price, 145 Mass. 513, 14 N. E. 741, 743, the court passed upon a covenant

which read as follows: "If the premises are for sale at any time, the lessee shall have the refusal of them." That, in substance, was virtually to the same effect as the provision in the case at bar. The court, in holding that covenant void for uncertainty, said: "This is simply an agreement to give the lessee the first chance to make a contract,—an agreement to sell,—if the parties can agree, but not otherwise. It neither fixes the price, nor provides any way in which it can be fixed. Suppose that the premises had been advertised for sale, and that the tenant had brought his bill at once. It is plain that the court could not have named any sum at which the lessor should be compelled to sell. Considered, therefore, in the light of a contract to sell, as it is treated by the bill, it does not satisfy the statute of frauds, and apart from the statute it is not such a contract as equity can specifically enforce."

That is equally applicable to the provision upon which plaintiff relies. It neither provides that the price was to be some specified or a reasonable amount, nor does it provide any manner by which the price is to be ascertained or determined. At best it is nothing more than an agreement to make a future agreement as to an essential term, which cannot be supplied by implication of law. Under the circumstances, because there has been no meeting of the minds as to an essential term, there can be no recovery. Laird v. Boyle, 2 Wis. 431; Freeman v. Morris, 131 Wis. 216, 109 N. W. 983, 20 Am. St. Rep. 1038, 11 Ann. Cas. 481; Goldstine v. Tolman, 157 Wis. 141, 147 N. W. 7; St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 235 N. Y. 30, 138 N. E. 495; Ansorge v. Kane, 244 N. Y. 395, 155 N. E. 683; Pfent v. Michaux, 231 Mich. 500, 204 N. W. 86.

Judgment affirmed.

OWEN, J., took no part.

DETTLOFF v. LANGKAU.

Supreme Court of Wisconsin.
March 6, 1934.

Partnership ⊂⊃34.

Where painter represented expressly and by acquiescence that another was his partner, alleged partner had apparent authority to receive payment for work done and release employer, notwithstanding partnership representations were untrue.

Appeal from a judgment of the Municipal Court for Winnebago County; Silas Spengler, Municipal Judge.

Action by Mike Dettloff against Otto Langkau. Judgment for plaintiff, and defendant appeals.—[By Editorial Staff.]

Reversed and remanded.

This action was begun on September 2, 1932, to recover for services rendered under contract. Upon the trial, the court found in favor of the plaintiff, judgment being entered on January 3, 1933, from which the defendant appeals.

From the evidence it appears that the plaintiff is a painting contractor. He and another contractor by the name of Alfred Pasano entered into an arrangement which Pasano claims was a partnership and which the plaintiff claims was an employment of Pasano by the plaintiff. Pasano had worked for the plaintiff by the hour. Upon the evidence, the trial court concluded that there was no partnership, but did not find the facts upon which the conclusion rests.

Upon the trial the plaintiff testified that he was a sole trader; that he made an arrangement with Pasano by which Pasano was to look up jobs; that the Langkau job was reported to plaintiff; and that the plaintiff made the contract under which the painting was done. He said: "Mr. Pasano was along with me and told me where the people lived. He looked the job up for me. He wasn't a partner of mine. I never heard him tell anyone that he was a partner of mine, and I never told anyone he was a partner of mine. He got a premium of ten cents an hour more if he would get the job. That was the scale. He didn't take the job, I did it. He just canvassed the job for me."

The defendant testified that Pasano introduced Dettloff to him as Pasano's partner, to which Dettloff made no response; Dettloff and Pasano came together; the estimate was submitted on a slip which had the name of Dettloff at the top. Defendant further testified that his talk was with Pasano as to the price. The defendant's wife testified that when Pasano brought Dettloff in, Pasano said, "This is my partner, Mr. Dettloff"; that Mr. Dettloff made no response. The defendant's daughter testified to the introduction, at which time she stated that Pasano said:

(235 N. Y. 335)

SUN PRINTING & PUBLISHING ASS'N v. REMINGTON PAPER & POWER CO., Inc.

(Court of Appeals of New York. April 17, 1923.)

1. Sales ⇐⇒1(3)—Where price and length of terms during which price was to apply were to be agreed on, agreement on price without agreement on length of terms held insufficient to bind seller.

Where a contract provided for the purchase of paper during September, 1919, to December, 1920, inclusive, at a definite price for the shipments during the last four months of 1919, and for 1920 "the price of the paper and length of terms for which such price shall apply shall be agreed upon * * * 15 days prior to the expiration of each period for which the price and length of term thereof have been previously agreed upon," the price in no event to be higher than the contract price charged by a named company "to the large consumers," *held* that, as to the 1920 shipments, an agreement as to price, as by impliedly agreeing on the maximum price charged by the named company, by failure to agree on a less price, was insufficient without an agreement as to the length of term for which the price should be applied, the result being an agreement to agree, so that the seller was legally justified in refusing deliveries for 1920.

2. Contracts ⇐⇒143—Court may not revise contract while professing to construe it.

A court is not at liberty to revise a contract while professing to construe it.

Crane and Hogan, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Sun Printing & Publishing Association against the Remington Paper & Power Company, Inc. From an order of the Appellate Division (201 App. Div. 3, 193 N. Y. Supp. 698), which reversed an order of the Special Term denying plaintiff's motion for judgment on the pleadings, and granted said motion, defendant, by permission, appeals. The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?" Order of Appellate Division reversed, and that of Special Term affirmed, with costs in the Appellate Division, and question answered.

Nathan L. Miller, of New York City, for appellant.

Archibald R. Watson, John M. Harrington, and Ralph O. Willgoss, all of New York City, for respondent.

CARDOZO, J. [1] Plaintiff agreed to buy and defendant to sell 1,000 tons of paper per month during the months of September, 1919, to December, 1920, inclusive, 16,000 tons in all. Sizes and quality were adequately described. Payment was to be made on the 20th of each month for all paper shipped the previous month. The price for shipments in September, 1919, was to be $3.73½ per 100 pounds, and for shipments in October, November, and December, 1919, $4 per 100 pounds. "For the balance of the period of this agreement the price of the paper and length of terms for which such price shall apply shall be agreed upon by and between the parties hereto fifteen days prior to the expiration of each period for which the price and length of term thereof have been previously agreed upon, said price in no event to be higher than the contract price for news print charged by the Canadian Export Paper Company to the large consumers, the seller to receive the benefit of any differentials in freight rates."

Between September, 1919, and December of that year, inclusive, shipments were made and paid for as required by the contract. The time then arrived when there was to be an agreement upon a new price and upon the term of its duration. The defendant in advance of that time gave notice that the contract was imperfect, and disclaimed for the future an obligation to deliver. Upon this the plaintiff took the ground that the price was to be ascertained by resort to an established standard. It made demand that during each month of 1920 the defendant deliver 1,000 tons of paper at the contract price for news print charged by the Canadian Export Paper Company to the large consumers, the defendant to receive the benefit of any differentials in freight rates. The demand was renewed month by month till the expiration of the year. This action has been brought to recover the ensuing damage.

Seller and buyer left two subjects to be settled in the middle of December and at unstated intervals thereafter. One was the price to be paid. The other was the length of time during which such price was to govern. Agreement as to the one was insufficient without agreement as to the other. If price and nothing more had been left open for adjustment, there might be force in the contention that the buyer would be viewed, in the light of later provisions, as the holder of an option. Cohen & Sons v. Lurie Woolen Co., 232 N. Y. 112, 133 N. E. 370. This would mean that, in default of an agreement for a lower price, the plaintiff would have the privilege of calling for delivery in accordance with a price established as a maximum. The price to be agreed upon might be less, but could not be more, than "the contract price for news print charged by the Canadian Ex-

port Paper Company to the large consumers." The difficulty is, however, that ascertainment of this price does not dispense with the necessity for agreement in respect of the term during which the price is to apply. Agreement upon a maximum payable this month or to-day is not the same as an agreement that it shall continue to be payable next month or to-morrow. Seller and buyer understood that the price to be fixed in December for a term to be agreed upon would not be more than the price then charged by the Canadian Export Paper Company to the large consumers. They did not understand that, if during the term so established the price charged by the Canadian Export Paper Company was changed, the price payable to the seller would fluctuate accordingly. This was conceded by plaintiff's counsel on the argument before us. The seller was to receive no more during the running of the prescribed term, though the Canadian Maximum was raised. The buyer was to pay no less during that term, though the maximum was lowered. In the brief, the standard was to be applied at the beginning of the successive terms, but once applied was to be maintained until the term should have expired. While the term was unknown, the contract was inchoate.

The argument is made that there was no need of an agreement as to time unless the price to be paid was lower than the maximum. We find no evidence of this intention in the language of the contract. The result would then be that the defendant would never know where it stood. The plaintiff was under no duty to accept the Canadian standard. It does not assert that it was. What it asserts is that the contract amounted to the concession of an option. Without an agreement as to time, however, there would be not one option, but a dozen. The Canadian price to-day might be less than the Canadian price to-morrow. Election by the buyer to proceed with performance at the price prevailing in one month would not bind it to proceed at the price prevailing in another. Successive options to be exercised every month would thus be read into the contract. Nothing in the wording discloses the intention of the seller to place itself to that extent at the mercy of the buyer. Even if, however, we were to interpolate the restriction that the option, if exercised at all, must be exercised only once, and for the entire quantity permitted, the difficulty would not be ended. Market prices in 1920 happened to rise. The importance of the time element becomes apparent when we ask ourselves what the seller's position would be if they had happened to fall. Without an agreement as to time, the maximum would be lowered from one shipment to another with every reduction of the standard. With such an agreement, on the other hand, there would be stability and certainty. The parties attempted to guard against the contingency of failing to come together as to price. They did not guard against the contingency of failing to come together as to time. Very likely they thought the latter contingency so remote that it could safely be disregarded. In any event, whether through design or through inadvertence, they left the gap unfilled. The result was nothing more than "an agreement to agree." St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 235 N. Y. 30, 36, 138 N. E. 495. Defendant "exercised its legal right" when it insisted that there was need of something more. St. Regis Paper Co. v. Hubbs & Hastings Paper Co., supra; 1 Williston Contracts, § 45. The right is not affected by our appraisal of the motive. Mayer v. McCreery, 119 N. Y. 434, 440, 23 N. E. 1045.

[2] We are told that the defendant was under a duty, in default of an agreement, to accept a term that would be reasonable in view of the nature of the transaction and the practice of the business. To hold it to such a standard is to make the contract over. The defendant reserved the privilege of doing its business in its own way, and did not undertake to conform to the practice and beliefs of others. United Press v. New York Press Co., 164 N. Y. 406, 413, 58 N. E. 527, 53 L. R. A. 288. We are told again that there was a duty, in default of other agreement, to act as if the successive terms were to expire every month. The contract says they are to expire at such intervals as the agreement may prescribe. There is need, it is true, of no high degree of ingenuity to show how the parties, with little change of language, could have framed a form of contract to which obligation would attach. The difficulty is that they framed another. We are not at liberty to revise while professing to construe.

We do not ignore the allegation of the complaint that the contract price charged by the Canadian Export Paper Company to the large consumers "constituted a definite and well-defined standard of price that was readily ascertainable." The suggestion is made by members of the court that the price so charged may have been known to be one established for the year, so that fluctuation would be impossible. If that was its character, the complaint should so allege. The writing signed by the parties calls for an agreement as to time. The complaint concedes that no such agreement has been made. The result, prima facie, is the failure of the contract. In that situation the pleader has the burden of setting forth the extrinsic circumstances, if there are any, that make

agreement unimportant. There is significance, moreover, in the attitude of counsel. No point is made in brief or in argument that the Canadian price, when once established, is constant through the year. On the contrary, there is at least a tacit assumption that it varies with the market. The buyer acted on the same assumption when it renewed the demand from month to month, making tender of performance at the prices then prevailing. If we misconceive the course of dealing, the plaintiff by amendment of its pleading can correct our misconception. The complaint as it comes before us leaves no escape from the conclusion that agreement in respect of time is as essential to a completed contract as agreement in respect of price. The agreement was not reached, and the defendant is not bound.

The question is not here whether the defendant would have failed in the fulfillment of its duty by an arbitrary refusal to reach any agreement as to time after notice from the plaintiff that it might make division of the terms in any way it pleased. No such notice was given, so far as the complaint discloses. The action is not based upon a refusal to treat with the defendant and attempt to arrive at an agreement. Whether any such theory of liability would be tenable we need not now inquire. Even if the plaintiff might have stood upon the defendant's denial of obligation as amounting to such a refusal, it did not elect to do so. Instead, it gave its own construction to the contract, fixed for itself the length of the successive terms, and thereby coupled its demand with a condition which there was no duty to accept. Rubber Trading Co. v. Manhattan Rubber Mfg. Co., 221 N. Y. 120, 116 N. E. 789; 3 Williston, Contracts, § 1334. We find no allegation of readiness, and offer to proceed on any other basis. The condition being untenable, the failure to comply with it cannot give a cause of action.

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs in the Appellate Division and in this court, and the question certified answered in the negative.

CRANE, J. (dissenting). I cannot take the view of this contract that has been adopted by the majority. The parties to this transaction beyond question thought they were making a contract for the purchase and sale of 16,000 tons rolls news print. The contract was upon a form used by the defendant in its business, and we must suppose that it was intended to be what it states to be, and not a trick or device to defraud merchants. It begins by saying that, in consideration of the mutual covenants and agreements herein set forth the Remington Paper & Power Company, Incorporated, of Watertown, state of New York, hereinafter called the seller, agrees to sell and hereby does sell and the Sun Printing & Publishing Association of New York City, state of New York, hereinafter called the purchaser, agrees to buy and pay for and hereby does buy the following paper, 16,000 tons rolls news print. The sizes are then given. Shipment is to be at the rate of 1,000 tons per month to December, 1920, inclusive. There are details under the headings consignee, specifications, price and delivery, terms, miscellaneous, cores, claims, contingencies, cancellations.

Under the head of miscellaneous comes the following:

"The price agreed upon between the parties hereto, for all papers shipped during the month of September, 1919, shall be $3.73½ per hundred pounds gross weight of rolls on board cars at mills.

"The price agreed upon between the parties hereto for all shipments made during the months of October, November and December, 1919, shall be $4.00 per hundred pounds gross weight of rolls on board cars at mills.

"For the balance of the period of this agreement the price of the paper and length of terms for which such price shall apply shall be agreed upon by and between the parties hereto fifteen days prior to the expiration of each period for which the price and length of term thereof has been previously agreed upon, said price in no event to be higher than the contract price for news print charged by the Canadian Export Paper Company to the large consumers, the seller to receive the benefit of any differentials in freight rates.

"It is understood and agreed by the parties hereto that the tonnage specified herein is for use in the printing and publication of the various editions of the Daily and Sunday New York Sun, and any variation from this will be considered a breach of contract."

After the deliveries for September, October, November, and December, 1919, the defendant refused to fix any price for the deliveries during the subsequent months, and refused to deliver any more paper. It has taken the position that this document was no contract; that it meant nothing; that it was formally executed for the purpose of permitting the defendant to furnish paper or not, as it pleased.

Surely these parties must have had in mind that some binding agreement was made for the sale and delivery of 16,000 tons rolls of paper, and that the instrument contained all the elements necessary to make a binding contract. It is a strain upon reason to imagine the paper house, the Remington Paper & Power Company, Incorporated, and the Sun Printing & Publishing Association, form-

ally executing a contract drawn up upon the defendant's prepared form which was useless and amounted to nothing. We must, at least, start the examination of this agreement by believing that these intelligent parties intended to make a binding contract. If this be so, the court should spell out a binding contract, if it be possible. I not only think it possible, but think the paper itself clearly states a contract recognized under all the rules at law. It is said that the one essential element of price is lacking; that the provision above quoted is an agreement to agree to a price, and that the defendant had the privilege of agreeing or not, as it pleased; that, if it failed to agree to a price, there was no standard by which to measure the amount the plaintiff would have to pay. The contract does state, however, just this very thing. Fifteen days before the 1st of January, 1920, the parties were to agree upon the price of the paper to be delivered thereafter, and the length of the period for which such price should apply. However, the price to be fixed was not "to be higher than the contract price for news print charged by the Canadian Export Paper Company to large consumers." Here, surely, was something definite. The 15th day of December arrived. The defendant refused to deliver. At that time there was a price for news print charged by the Canadian Export Paper Company. If the plaintiff offered to pay this price, which was the highest price the defendant could demand, the defendant was bound to deliver. This seems to be very clear.

But, while all agree that the price on the 15th day of December could be fixed, the further objection is made that the period during which that price should continue was not agreed upon. There are many answers to this.

We have reason to believe that the parties supposed they were making a binding contract; that they had fixed the terms by which one was required to take and the other to deliver; that the Canadian Export Paper Company price was to be the highest that could be charged in any event. These things being so, the court should be very reluctant to permit a defendant to avoid its contract. Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

On the 15th of the fourth month, the time when the price was to be fixed for subsequent deliveries, there was a price charged by the Canadian Export Paper Company to large consumers. As the defendant failed to agree upon a price, made no attempt to agree upon a price, and deliberately broke its contract, it could readily be held to deliver the rest of the paper, 1,000 rolls a month, at this Canadian price. There is nothing in the complaint which indicates that this is a fluctuating price, or that the price of paper as it was on December 15th was not the same for the remaining 12 months. Or we can deal with this contract month by month. The deliveries were to be made 1,000 tons per month. On December 15th 1,000 tons could have been demanded. The price charged by the Canadian Export Paper Company on the 15th of each month on and after December 15, 1919, would be the price for the 1,000-ton delivery for that month. Or, again, the word as used in the miscellaneous provision quoted is not "price," but "contract price"—"in no event to be higher than the contract price." Contract implies a term or period, and, if the evidence should show that the Canadian contract price was for a certain period of weeks or months, then this period could be applied to the contract in question. Failing any other alternative, the law should do here what it has done in so many other cases—apply the rule of reason and compel parties to contract in the light of fair dealing. It could hold this defendant to deliver its paper as it agreed to do, and take for a price the Canadian Export Paper Company contract price for a period which is reasonable under all the circumstances and conditions as applied in the paper trade.

To let this defendant escape from its formal obligations when any one of these rulings as applied to this contract would give a practical and just result is to give the sanction of law to a deliberate breach. Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214; Moran v. Standard Oil Co., 211 N. Y. 187, 105 N. E. 217; United States Rubber Co. v. Silverstein, 229 N. Y. 168, 128 N. E. 123.

For these reasons I am for the affirmance of the courts below.

HISCOCK, C. J., and POUND, McLAUGHLIN, and ANDREWS, JJ., concur with CARDOZO, J.

CRANE, J., reads dissenting opinion with which HOGAN, J., concurs.

Order reversed, etc.

Circuit Court of Appeals, Eighth Circuit.
PALMER
v.
AEOLIAN CO.
No. 8978.

Jan. 12, 1931.
Rehearing Denied Feb. 18, 1931.

Appeal from the District Court of the United States for the Southern District of Iowa; Charles A. Dewey, Judge.

Suit by B. J. Palmer against the Aeolian Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

West Headnotes

[1] Federal Courts ⇐ 758
170Bk758 Most Cited Cases
(Formerly 30k850(3))
Where case was tried to court without jury, specific findings of fact made at same term as judgment dismissing petition may be considered on appeal. 28 U.S.C.A. §§ 773, 875.

[2] Federal Courts ⇐ 758
170Bk758 Most Cited Cases
(Formerly 30k849(1))
Only questions properly presented for review where case was tried to court without jury are sufficiency of pleadings and special findings to support judgment and rulings on testimony. 28 U.S.C.A. § § 773, 875.

[3] Commerce ⇐ 54.5
83k54.5 Most Cited Cases
(Formerly 83k46)
Local statutes governing right of foreign corporation to do business within state would be inapplicable if contract was part of transaction in interstate commerce. Code Iowa 1924, §§ 8420, 8427, 8429-8431.

[4] Commerce ⇐ 54.5
83k54.5 Most Cited Cases
(Formerly 83k46)
Contract by Connecticut corporation doing business in New Jersey to build, deliver, and install organ in theater in Iowa held transaction in "interstate commerce," and therefore local statutes governing foreign corporation doing business within state were inapplicable (Code Iowa 1924, Secs. 8420, 8427, 8429-8431). Terms of contract required foreign corporation to build, deliver, and install organ according to written specifications and general details of construction made part of contract 'of the highest attainable standard in both workmanship and material'; called for delivery of organ f.o.b. cars at Garwood, N.J.; provided that organ after delivery to purchaser should be at purchaser's risk against damage by fire or water, and that title to organ should remain in seller until it was fully paid for. It was not shown that organ could have been assembled or installed by any persons other than employees of manufacturer and seller.

[5] Appeal and Error ⇐ 989
30k989 Most Cited Cases

[5] Appeal and Error ⇐ 1122(2)
30k1122(2) Most Cited Cases
Appellate court in case tried to court without jury cannot determine whether evidence supports findings or makes further finding (28 USCA 773, 875).

[6] Contracts ⇐ 9(1)
95k9(1) Most Cited Cases
Contract must be reasonably certain in all its terms.

[7] Evidence ⇐ 457
157k457 Most Cited Cases
Parol evidence is admissible to show meaning of technical terms used in contract.

[8] Evidence ⇐ 460(2)
157k460(2) Most Cited Cases
Parol evidence is admissible to identify subject-matter of contract.

[9] Contracts ⇐ 9(1)
95k9(1) Most Cited Cases
Part of contract though indefinite would not render entire contract unenforceable unless indefinite part were so essential that it would be unfair to enforce remainder.

[10] Implied and Constructive Contracts ⇐ 92
205Hk92 Most Cited Cases
(Formerly 264k18(2) Money Received)
In suit to recover money paid under contract to build and install pipe organ, testimony regarding description of certain pipe in common use held properly excluded as immaterial. Contract to manufacture and install pipe organ in theater specified a certain 'diapason pipe,' and witness' attention was called to such specification, and he was asked question as to what descriptions of such pipes in common use in pipe organ such a specification would apply.

Implied and Constructive Contracts ⇐ 92
205Hk92 Most Cited Cases
(Formerly 264k18(2) Money Received)
In suit to recover money paid under contract to build and install pipe organ, testimony regarding description of certain pipe in common use held properly excluded as immaterial.

Federal Courts ⇐ 848
170Bk848 Most Cited Cases
(Formerly 30k989)
Appellate court in case tried to court without jury cannot determine whether evidence supports findings, Fed.Rules Civ.Proc. rules 38 et seq., 46, 52, 73, 75, 28 U.S.C.A.

Federal Courts ⇐ 921
170Bk921 Most Cited Cases
(Formerly 30k1122(2))
Appellate court in case tried to court without jury cannot make further findings. Fed.Rules Civ.Proc. rules 38 et seq., 46, 52, 73, 75, 28 U.S.C.A.

Commerce ⇐ 54.5
83k54.5 Most Cited Cases
(Formerly 83k46)
Contract by Connecticut corporation doing business in New Jersey to build, deliver, and install organ in theater in Iowa *held* transaction in "interstate commerce," and therefore local statutes governing foreign corporation doing business within state were inapplicable. Code Iowa 1924, §§ 8420, 8427, 8429- 8431.

***747** A. G. Bush, of Davenport, Iowa (Curtis Bush, of Davenport, Iowa, on the brief), for appellant.

Wayne G. Cook, of Davenport, Iowa (Messrs. Lane & Waterman, of Davenport, Iowa, on the brief), for appellee.

Before KENYON and GARDNER, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge.

Appellant, as the plaintiff below, brought suit against the appellee, as the defendant, to recover a sum of money which the plaintiff had paid to the defendant. From a judgment in favor of the defendant this appeal is prosecuted.

[1][2] The plaintiff and defendant had made a written contract, by whose terms the defendant was to build a pipe organ for plaintiff, to deliver it on board cars in New Jersey, and to install it in a designated theater at Davenport, Iowa. The plaintiff agreed to pay $150,000 for the organ, and paid one-tenth of the purchase price when the contract was signed. Some months afterwards the plaintiff notified the defendant that he would not accept the organ and afterwards brought this suit to recover from the defendant the money which he had paid. In his petition he claimed that the contract was void because it was made in Iowa and the defendant, a foreign corporation, had not complied with the laws of Iowa requiring a permit for such a corporation to do business in the state and because the contract was indefinite. The defendant's answer, in addition to denials, admitted the making of the written contract and admitted that it had not obtained a permit to do business in Iowa, but alleged that the contract covered a lawful transaction in interstate commerce and denied that it transacted business in Iowa in violation of the laws of the state. The answer admitted that the defendant had received the $15,000 in pursuance of the contract, and that the organ was not constructed or erected, but alleged that the defendant had always been ready to perform its contract and was prevented from doing so only by the acts and omissions of the plaintiff and that the plaintiff had abandoned his plans for the erection of the building in which the organ was to be installed. The case was tried to the court, a jury trial having been waived by a stipulation in writing. The court filed a memorandum opinion and dismissal of the plaintiff's petition, but later, and at the same term, made specific findings of fact. These findings may be considered on this appeal (South Utah Mines v. Beaver County, 262 U.S. 325, 43 S.Ct. 577, 67

L.Ed. 1004), but under the provisions of sections 649 and 700 of the Revised Statutes (28 U.S.Code, §§ 773, 875 (28 USCA §§ 773, 875)) the only questions properly presented for review are the sufficiency of the pleadings and of the special findings to support the judgment, and rulings as to the offer of testimony of a witness, made during the trial. Lewellyn v. Elec. Reduction Co., 275 U.S. 243, 48 S.Ct. 63, 72 L.Ed. 262; Fleischmann Co. v. United States, 270 U.S. 349, 46 S.Ct. 284, 70 L.Ed. 624; Tyre & Spring Works Co. v. Spalding, 116 U.S. 541, 6 S.Ct. 498, 29 L.Ed. 720; The City of New York, 147 U.S. 72, 13 S.Ct. 211, 37 L.Ed. 84; Tatum v. Davis (C.C.A.) 283 F. 948; Randle v. Barnard (C.C.A.) 81 F. 682; City of Mankato v. Barber Asphalt Paving Co. (C.C.A.) 142 F. 329.

The court found that the defendant, a corporation organized under the laws of Connecticut, made a written contract on November 3, 1924, at Davenport, Iowa, with the plaintiff, a resident of Iowa. By the terms of the contract the defendant agreed to build and to deliver f.o.b. cars at Garwood, N.J., an Aeolian pipe organ, according to written specifications and general details of construction made a part of the contract, 'of the *748 highest attainable standard in both workmanship and material, and to erect the same' in the Kindt theater at Davenport, Iowa, on or before August 1, 1926. The court found that the plaintiff was then planning to build such a theater, but that it was never built. The court found that it was supposed that this pipe organ would be the largest in the world and would require a year for its manufacture and four to six months for its installation. The plaintiff notified the defendant on April 24, 1925, to do no work on the organ. The court found that there had been no abandonment of the contract and no inability of the defendant to manufacture and install the organ according to the contract. The specifications, made a part of the contract, began with this recital: 'Specifications for an Aeolian pipe-organ prepared for the Kindt Theater, Davenport, Iowa. Grand six-manual symphonic Duo-Art Aeolian Pipe-Organ containing open diapason pedal stop of 64' pitch. Compass of Manuals CC to C4 61 keys. Compass of Pedals CCC to G 32 keys.' The specifications then number and list 303 items. The general details of construction, included in the contract, provided for the location of the organ and a console, with accessories, the furnishing, by the defendant, of an electric blowing plant, and a low voltage generator. The plaintiff agreed to prepare the organ chamber and blower room and to furnish some accessories for the use of the organ.

The contract provided that if the organ chamber or theater was not in condition to receive the organ four months prior to the installation date, the purchaser should accept shipment of the organ, that the organ should be at the risk of the purchaser against damage by fire or water after its arrival on the premises, and that the title ownership of the organ should remain in the seller until it was fully paid for. The court found that the defendant at the time the contract was made had not applied for or obtained a permit in Iowa to do business as a corporation nor had it complied with the laws of Iowa relating to that subject.

The statutes of Iowa required that a foreign corporation desiring to do business in Iowa shall file a copy of its articles of incorporation with the secretary of state, and shall authorize services of process to be made on certain persons within the state. It is further provided that no corporation shall exercise any of the rights or privileges conferred on corporations unless it has complied with these requirements. There are also provisions denying a right to maintain suits, and providing for penalties and punishments. Code of Iowa (1924) Secs. 8420, 8427, 8429, 8430, 8431.

[3] Appellant claims that the contract was void, because of the making of the contract in Iowa, when the defendant was unqualified to do so, under the statutes. If the making of the contract was an act by which the parties were engaging in interstate commerce, these statutes of Iowa could have no application. Butler Bros. Shoe Co. v. United States Rubber Co. (C.C.A.) 156 F. 1. The first question, therefore, is the nature of the contract which was made. In Sioux Remedy Co. v. Cope, 235 U.S. 197, 35 S.Ct. 57, 59, 59 L.Ed. 193, the court, in an error proceeding to a state court, considered a written contract, made in South Dakota, for the sale of merchandise, and providing for the shipment of the merchandise by the plaintiff from its place of business in Iowa to the defendants at their place of business and residence in South Dakota. A statute of South Dakota, in substance, prohibited any foreign corporation from transacting business in South Dakota until it had filed a copy of its articles

of incorporation with the secretary of state, and further provided that no action by such a corporation could be maintained in the courts of the state on any contract made in the state unless it had appointed a resident agent upon whom process could be served, and unless copies of such appointment had been filed in certain public offices. The Supreme Court upheld the contract, saying:

'The contract and sale out of which the action arose were transactions in interstate commerce, and entirely legitimate notwithstanding the plaintiff's noncompliance with the state statute. International Text Book Co. v. Pigg, 217 U.S. 91, 30 S.Ct. 481, 54 L.Ed. 678, 27 L.R.A.(N.S.) 493, 18 Ann.Cas. 1103; Buck Stove Co. v. Vickers, 226 U.S. 205, 33 S.Ct. 41, 57 L.Ed. 189; Flint & Walling Mfg. Co. v. McDonald, 21 S.D. 526, 114 N.W. 684, 14 L.R.A. (N.S.) 673, 130 Am.St.Rep. 735.'

In Buck Stove Co. v. Vickers, 226 U.S. 205, 33 S.Ct. 41, 57 L.Ed. 189, a statute of Kansas required foreign corporations to file statements as a prerequisite to doing business in that state. The statute was held to be invalid as to transactions in interstate commerce. In deciding the questions involved, the court quoted from a prior decision in International Text-Book Co. v. Pigg, 217 U.S. 91, 30 S.Ct. 481, 486, 54 L.Ed. 678, 27 L.R.A.***749** (N.S.)))) 493, 18 Ann.Cas; 1103, as follows:

'To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. * * *

'How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided. It is sufficient to say that the requirement of the statement mentioned in Sec. 1283 (section 1358, Gen. Stat. 1905) of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is in violation of its constitutional rights. It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state, confessedly, could not control by legislation. It results that the provision as to the statement mentioned in Sec. 1283 (Sec. 1358, Gen. Stat. 1905) must fall before the Constitution of the United States, and with it-- according to the established rules of statutory construction-- must fall that part of the same section which provides that the obtaining of the certificate of the secretary of state that such statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas.'

The general rule of the lawfulness of a contract for a sale of an article in interstate commerce, although the contract is made within the state, as against a state statute forbidding contracts of that nature, is illustrated in Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128, where a sale of intoxicating liquor in an original package which the seller had brought into the state was held to be valid notwithstanding the state law forbade such a sale, and in Schollenberger v. Pennsylvania, 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49, holding valid a sale within the state of a package of oleomargarine when sold by the agent of the importer in the package in which it was shipped into the state, although the state statute prohibited the manufacture and sale of such an article. In Fed. Trade Comm. v. Pac. States Paper Trade Ass'n, 273 U.S. 52, 47 S.Ct. 255, 258, 71 L.Ed. 534, the court said:

''Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' Swift & Company v. United States, 196 U.S. 375, 398, 25 S.Ct. 276, 280, 49 L.Ed. 518. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. Dozier v. Alabama, 218 U.S. 124, 128, 30 S.Ct. 649, 54 L.Ed. 965, 28 L.R.A.(N.S.) 264. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the

component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another. Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 290, 42 S.Ct. 106, 66 L.Ed. 239; Lemke v. Farmers' Grain Co., 258 U.S. 50, 55, 42 S.Ct. 244, 66 L.Ed. 458. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. Sonneborn Bros. v. Cureton, 262 U.S. 506, 515, 43 S.Ct. 643, 67 L.Ed. 1095.'

In the case cited of Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S.Ct. 643, 646, 67 L.Ed. 1095, the court said:

'Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of ***750** it and a burden upon it. Robbins v. Shelby County Taxing District, 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694; Asher v. Texas, 128 U.S. 129, 9 S.Ct. 1, 32 L.Ed. 368; Stoutenburgh v. Hennick, 129 U.S. 141, 147, 9 S.Ct. 256, 32 L.Ed. 637; Caldwell v. North Carolina, 187 U.S. 622, 23 S.Ct. 229, 47 L.Ed. 336; Rearick v. Pennsylvania, 203 U.S. 507, 27 S.Ct. 159, 51 L.Ed. 295; Brennan v. Titusville, 153 U.S. 289, 14 S.Ct. 829, 38 L. ed. 719; Dozier v. Alabama, 218 U.S. 124, 30 S.Ct. 649, 54 L.Ed. 965, 28 L.R.A.(N.S.) 264; Crenshaw v. Arkansas, 227 U.S. 389, 33 S.Ct. 294, 57 L.Ed. 565. Stewart v. Michigan, 232 U.S. 665, 34 S.Ct. 476, 58 L.Ed. 786; Western Oil Refining Co. v. Lipscomb, 244 U.S. 346, 37 S.Ct. 623 61 L.Ed. 1181.'

[4] Appellant claims that the contract did not provide for a sale in interstate commerce because of the provision in the contract that the organ should be delivered f.o.b. Garwood, N.J. But the contract also provided for the manufacture of the organ by the defendant, and for its installation by the defendant in a theater at Davenport, Iowa, for retention of title in the seller until final payment was made, and that risk of loss by fire or water was to be assumed by the purchaser after the arrival of the organ at the theater. The fact of an agreed delivery f.o.b. cars in New Jersey is one that must be considered in determining the nature of this contract, but it is not necessarily decisive. Considering the purpose the parties had in mind, of the final assembling and delivery of a completed organ in place in a theater at Davenport, it seems clear that a sale and delivery of the organ in interstate commerce was contemplated, and the provision for delivery free on board cars in New Jersey was a mere arrangement by which the purchaser agreed to pay the freight charges from Garwood to Davenport. Savage v. Jones, 225 U.S. 501, 32 S.Ct. 715 56 L.Ed. 1182; Pennsylvania R. Co. v. Clark Bros. Coal Co., 238 U.S. 451; 35 S.Ct. 896, 59 L.Ed. 1406; Pennsylvania R. Co. v. Sonman Coal Co., 242 U.S. 120, 37 S.Ct. 46, 61 L.Ed. 188; Rawleigh Co. v. Walker, 117 Okl. 256, 246 P. 417; Reaves Lumber Co. v. Cain-Hurley Lumber Co., 152 Tenn. 339, 279 S.W. 257.

Appellant claims that some of the articles mentioned in the specifications could be procured in Iowa or elsewhere, and that the contract does not call for the shipment of these articles in interstate transportation, as the contract provides for the shipment from New Jersey of the pipe organ only. The parties by the terms of their contract, in effect, described the pipe organ as one embracing the several parts mentioned in the specifications, and there is nothing in the record to show that these parts are not essential to the completed organ contracted for. Appellant also claims that the contract should be subject to the Iowa statute, because the contract provided for the manufacture of the organ, and that manufacture is not commerce. The contract not only provided for the building of the organ but for its installation.

'Where the contract is for the sale of the article and for its delivery in another state, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfill his contract of sale.' Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S.Ct. 96,

109, 44 L.Ed. 136.

Appellant also contends that the principal and essential thing contracted for was the installation of the organ in the theater in Iowa, that the installation was not such a part of the delivery of the organ as to be embraced within any interstate sale, and that the transaction should be governed by the principle announced in cases such as Browning v. City of Waycross, 233 U.S. 16, 34 S.Ct. 578, 580, 58 L.Ed. 828; General Railway Signal Co. v. Commonwealth of Virginia, 118 Va. 301, 87 S.E. 598, affirmed in 246 U.S. 500, 38 S.Ct. 360, 62 L.Ed. 854; Western Gas Const. Co. v. Commonwealth of Virginia, 147 Va. 235, 136 S.E. 646, 55 A.L.R. 717, affirmed in 276 U.S. 597, 48 S.Ct. 319, 72 L.Ed. 723. In Browning v. Waycross, it was held an agreement for the erection of lightning rods as a part of a contract for the sale of the rods in interstate commerce was an act of mere local business within the state, and subject to the control by state authority. In General Railway Signal Co. v. Virginia, 246 U.S. 500, 38 S.Ct. 360, 62 L.Ed. 854, it was held that a corporation of New York was subject to a local law of Virginia because it was doing business in that state separate from interstate commerce. It appeared that the corporation made a contract to furnish material and labor and to install and erect an extensive railway signal system. In Western Gas Const. Co. v. Commonwealth of Virginia (affirmed in a memorandum opinion in 276 U.S. 597, 48 S.Ct. 319, 72 L.Ed. 723, on the authority of Browning v. Waycross and General Railway Signal Co. v. Commonwealth of Virginia), the construction company had made a contract for the sale of gas machines and equipment which included an agreement ***751** for their installation. The construction work required was so extensive that the court was of the opinion that the sale was an incident of it, rather than that the construction was an incident of the sale, and that whatever supervision of the work was required could have been done by experts other than those of the seller.

In the Browning Case, the Supreme Court reserved the question whether an installation in a state of an article sold might be a part of the sale and delivery in interstate commerce 'where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction.' In York Manufacturing Co. v. Colley, 247 U.S. 21, 38 S.Ct. 430, 432, 62 L.Ed. 963, 11 A.L.R. 611, a contract was involved by which a Pennsylvania corporation had contracted for the sale of an ice making plant to a resident of Texas, the parts of the plant to be shipped to Texas where it was to be assembled and erected under the supervision of an expert sent by the seller. In determining that the work done in Texas did not subject the Pennsylvania Corporation to the laws of Texas requiring a permit to do business in that state by foreign corporations, the court stated the principles which should govern:

'As, in the second place, since the ruling in McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, there has been no doubt that the interstate commerce power embraced that which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that the right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract made. The only possible question open therefore is: Was the particular provision of the contract for the service of an engineer to assemble and erect the machinery in question at the point of destination and to practically test its efficiency before complete delivery relevant and appropriate to the interstate sale of the machinery? When the controversy is thus brought in last analysis to this issue there would seem to be no room for any but an affirmative answer. Generically this must be unless it can be said that an agreement to direct the assembling and supervision of machinery whose intrinsic value largely depends upon its being united and made operative as a whole is not appropriate to its sale. The consequence of such a ruling if made in this case would be particularly emphasized by a consideration of the functions of the machinery composing the plant which was sold, of its complexity, of the necessity of its aggregation and unison with mechanical skill and precision in order that the result of the contract of sale-- the ice plant purchased-- might come into existence. In its essential principle therefore the case is governed by Caldwell v. North Carolina, 187 U.S. 622, 23 S.Ct. 229, 47 L.Ed. 336; Rearick v. Pennsylvania, 203 U.S. 507, 27 S.Ct. 159, 51 L.Ed. 295, and Dozier v. Alabama, 218 U.S. 124, 30 S.Ct. 649, 54 L.Ed. 965, 28 L.R.A.(N.S.) 264. In fact those cases were relied upon in the Waycross

Case as supporting the contention that a mere agreement for the erection of lightning rods in a contract made concerning the shipment of such rods in interstate commerce caused the act of erection to be itself interstate commerce. But the basis upon which the cases were held to be not apposite, that is, the local characteristic of the work of putting up lightning rods, not only demonstrates beyond doubt the mistake concerning the ruling as to the Waycross Case which was below committed, but serves unerringly to establish the soundness of the distinction by which the particular question before us is brought within the reach of interstate commerce.

'Of course we are concerned only with the case before us, that is, with a contract inherently relating to and intrinsically dealing with the thing sold, the machinery and all its parts constituting the ice plant. This view must be borne in mind in order to make it clear that what is here said does not concern the subject passed on in General Railway Signal Co. v. Virginia, 246 U.S. 500, 38 S.Ct. 360, 62 L.Ed. 854, since in that case the work required to be done by the contract over and above its inherent and intrinsic relation to the subject-matter of the interstate commerce contract involved the performance of duties over which the state had a right to exercise control because of their inherent intrastate character. In fact the case last referred to when looked at from a broad point of view is but an illustration of the principle applied in the Waycross Case to the effect that that which was inherently intrastate did not lose its essential nature because it formed part of an interstate commerce contract to which it had no necessary relation. And this truth by a negative pregnant states the obverse view that that which is intrinsically interstate and immediately and inherently connected with interstate commerce is entitled *752 to the protection of the Constitution of the United States resulting from that relation.'

In applying the principles of these cases to the interpretation of the contract in this case, we may consider the contract for the organ and a description of the organ itself as set out in appellant's brief.

'It contains seven pages of specifications besides including a lot of things that are not specified. It calls for 8972 separate pipes, some of wood and some of metal, and some apparently fitted with reeds. These pipes range in size from the smallest such as the flute, fife, etc., up to the 64 foot diapason-- the largest pipes ever specified for an organ. It would take for the largest wood pipe alone as much wood as would be necessary to floor a large dance floor about 64' x 64' in size.

'The contract provides for 840 additional notes which are apparently produced by duplicating connections. It also provides for 430 percussion tones such as tower bells, orchestra bells, cathedral chimes, harps, glockenspiel, marimba, four drums, two grand pianos, etc., or a total of 9,505 separate tone producing elements, necessitating at least 9,505 separate magnets to operate them and the wiring connections to which such magnet would be connected.

'The contract calls for 131 stops, six banks of keys, 61 in each bank, or a total of 366, and 32 pedals played by foot with 29 couplers, 48 pistons, wind chests, blowing plant, electric generator, and the automatic duoart organ would require at least 398 pouches or bellows, assuming that there would be one for each key or pedal on the six manuals and pedal parts.'

There was to be what is called a great organ, an antiphonal organ located in an organ chamber two hundred and forty feet distant from the great organ, and the echo organ was to be located eighty to eighty-five feet from the main floor of the building. The specifications enter into elaborate detail in describing the many parts.

The findings do not show that the organ could have been assembled or installed by any others than employees of the defendant the Aeolian Company. It seems obvious that the value of such an organ would depend upon its being so installed that the purpose of the sale would be made effective. It would also seem to be obvious that in the case of such an instrument, which was to accomplish not only a mechanical result, but also an artistic success, that particular emphasis must be given, as the Supreme Court said was required in considering the contract for the sale of the ice machine, to a consideration of the functions of the organ machinery, of its complexity, of the necessity of its aggregation and unison with mechanical skill and precision in order that the result of the sale might come into existence. The relationship of the installation of similar pipe organs to this sale is thus

stated in a recent case, Aeolian Co. v. Fischer (C.C.A.) 40 F.(2d) 189, 190:

'The agreement of the organ manufacturer to install is not only relevant and appropriate to the interstate sale but is essential if an organ, as distinguished from its parts, may be sold at all. The thing sold is a musical instrument, complete in itself. * * * Without descending to mechanical description it may be said that the work of installation is of the most vital importance in the construction of the completed organ, and requires in its performance not only the highest mechanical skill but a thorough understanding of the methods employed by the manufacturer in the arrangement of mechanical and electrical connections. * * * Whatever distinctions may be drawn in doubtful cases, it is clear that the instant case is governed and controlled by the decision in the ice machine case (York Mfg. Co. v. Colley, 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963, 11 A.L.R. 611). The distinction there drawn between the setting up of lightning rods (Browning v. Waycross, 233 U.S. 16, 34 S.Ct. 578, 58 L.Ed. 828) and the installation of an ice machine shows that the contracts here in question for the construction and installation of organs clearly involve interstate commerce not only in the manufacture and shipment of the organ, but in its installation after arrival within the state.'

A full consideration of the facts shown by the pleadings and findings in this case leads to the conclusion that the making of the contract in question was so much an appropriate part of a sale of goods in interstate commerce that the statutes of Iowa which have been cited were not applicable and that the corporation legally executed the contract.

[5][6][7][8][9] The appellant also urges that the contract was so indefinite as to not be enforcible. He admits that as to some items of the specifications, which are claimed to be uncertain, it is necessary to resort to the evidence. As has been stated, this court is limited to the pleadings and findings of the court below, and therefore it may not consider whether or not the evidence supports the findings, nor can this court make further findings. This court is asked to take judicial notice that some of the parts to be furnished by the defendant *753 are of such a character that there must be many kinds of them, such as drums, cymbals, marimbas, and glockenspiel; also, that the organ would require electric wiring and electrical connections; and that the contract is silent as to the type of wiring to be used. A reasonable certainty is all that is required in the terms of a contract (1 Elliott on Contracts §§ 170, 178), and we do not find a lack of such reasonable certainty on the face of the contract. Parol evidence would be admissible to show the meaning of technical terms. And the specifications of a 'Grand Six Manual Symphonic Duo Art Aeolian Pipe Organ' might be shown of itself, to refer to some well known and definite article which was in the contemplation of the parties when the contract was signed. Evidence is receivable to identify the subject-matter of a contract. 1 Williston on Contracts, Sec. 179; 4 Wigmore On Ev. § 2465. Even if the contract were indefinite as to some items, it must appear that such items were so essential to the contract that it would be unfair to enforce the remainder. 1 Williston on Contracts, Sec. 48. No such fact appears.

[10] The only other objections that can be noticed relate to the testimony of a witness for the plaintiff, who testified that he had been a builder of pipe organs. His attention was called to a specification in this contract of a certain diapason pipe, and he was asked as to what descriptions of such pipes in common use in pipe organs such a specification would apply. Appellant stated that it was the intention to prove that there were at least two different pipes that might be included within the terms of that specification. Similar questions were asked as to two other items, but the evidence was excluded as immaterial. There was no error in those rulings. The contract called for items such as were stated in this portion of the specifications, but it also provided that the organ was to be built according to the specifications and of the highest attainable standard in both workmanship and materials. The questions put to the witness did not ask for his opinion whether there were several articles that would both answer to the description in the part of the specifications stated to him, and also be of the highest attainable standard in workmanship and materials. The parties had contracted for items of that quality and a plenitude of items which only partly corresponded to those agreed to be furnished was not a material subject of inquiry.

No reversible error is found in the record, and the judgment will be affirmed.

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